ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Bell Atlantic Telephone Companies	)	
Tariff FCC No. 1	)	CC Docket No. 98-168
Trans. No. 1076	)	

To: Competitive Pricing Division

OPPOSITION TO DIRECT CASE
OF FOCAL COMMUNICATIONS CORPORATION

Focal Communications Corporation ("Focal"), by its undersigned counsel, pursuant to the Order Suspending Tariff and Designating Issues for Investigation in this proceeding, submits these comments on the direct case filed by Bell Atlantic Telephone Companies ("Bell Atlantic"). Focal opposes the tariff of Bell Atlantic because the services provided thereunder are not exchange access and, accordingly, the tariff is not a legitimate "exchange access" tariff.[1] Moreover, to the extent that the proposed DSL services are similar to local dial-up telecommunications services, the telecommunications service from the end user to the ISP terminates at the ISP, at which point information services begin. The telecommunications service that would be subject to tariffing would be solely intrastate if an end user used local exchange service to connect to an information service provider. Finally, twenty-one (21) state commissions have determined that local exchange dial-up traffic from an end user to an ISP is local for the purposes of reciprocal compensation under the

[1]Both BellSouth Telecommunications, Inc. and US WEST, Inc. concede that the proposed ADSL service cannot be "exchange access." Direct Case of BellSouth Telecommunications, Inc., CC Docket No. 98-161, at 17; Comments of US WEST, Inc. on Direct Case of GTE, CC Docket No. 98-79, at 2.

terms of interconnection agreements. Any ruling by this Commission that in any way contradicted those decisions would raise federal-state conflicts and implicate federal preemption issues that are simply not relevant to the narrow issue before the Commission in this tariff review proceeding.

Focal filed comments in the proceedings considering the ADSL tariffs of GTE Telephone Operating Companies, BellSouth Telecommunications, Inc., Pacific Bell Telephone Company,[2] and GTE System Telephone Companies.[3] As Bell Atlantic concedes, "The issues under investigation in CC Docket Nos. 98-79, 98-103, and 98-161, which relate [to] DSL tariffs of GTE, Pacific Bell, and BellSouth, respectively, are identical to the issue designated here."[4] Therefore, Focal provides a copy of its Comments on the Direct Cases filed on September 18, 1998, and incorporates those comments into this investigation by reference. At the same time, however, in its Direct Case, Bell Atlantic addressed "many of the comments filed on the direct cases of those companies – comments that are certain to be repeated in this proceeding."[5] Focal will therefore address Bell Atlantic's additional comments in its Direct Case, particularly the points responsive to Focal's previously filed Comments regarding the termination of telecommunications service from an end user to an ISP, and the conflicts that will inevitably ensue from any FCC decision that undermines the decisions of state

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[2]GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148 CC Docket No. 98-79; BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, CC Docket No. 98-161; Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Trans. No. 1986, CC Docket No. 98-103.

[3]GTE System Telephone Companies, GSTC Tariff FCC No. 1, GSTC Trans. No. 260, CC Docket No. 98-167.

[4]Direct Case of Bell Atlantic at n.2.

[5]*Id.*

regulatory commissions that dial-up traffic from an end user to an ISP is eligible for reciprocal compensation under applicable interconnection agreements.

I. None of the cases cited by Bell Atlantic disproves the severability of telecommunications service from information service.

Bell Atlantic characterizes arguments asserted by Focal and others that the telecommunications service from an end user to an ISP terminates when the ISP answers an incoming call, at which point the ISP's provision of information services begins, as "two-call" claims.[6] Bell Atlantic then cites two cases and the example of Feature Group A that it claims rejects this "two-call" theory.[7] In fact, neither Feature Group A nor either of the cases cited even addresses the particular issue presented by a local exchange call to an information service provider, much less rejects the argument asserted by Focal and others. First, both the *Southwestern Bell Tel. Co.* case regarding the provision of 800 services for customers to use calling card services,[8] and the reference to Feature Group A exchange access service, relate to interim switching by a carrier in a continuous stream of *telecommunications* service. These examples are not relevant to this dispute because Focal does not question the inseverability of services when a telecommunications service is provided on both sides of a switching point. In this dispute, however, telecommunications service ends and information service begins when the telecommunications reaches the ISP from its customer, and the ISP then permits its customer to obtain information from sources located along the Internet.

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[6]Bell Atlantic Direct Case at 7.

[7]In the issue at hand, there is actually only one "call" and a separate information service. Bell Atlantic's attempt to dub these separate services as consisting of two calls is both misleading and unavailing.

[8]3 FCC Rcd. 2339 (1988).

The other example cited by Bell Atlantic, the *Georgia Voice Mail Case*,[9] also has no bearing on this dispute and does not reach the conclusion Bell Atlantic would like it to stand for. At issue in that case was whether an interstate telecommunications service could be considered severable at a local exchange switch when the telecommunications service was used to reach the particular enhanced service in question, voice mail. In that case, the enhanced service was provided by an apparatus at the terminating end of the telecommunications service. At no point did the Commission have to decide whether the enhanced service extended the jurisdictional reach of the telecommunications service, which is in effect Bell Atlantic's argument.

It is undisputed that the Commission recognizes that the telecommunications service provided by LECs from an end user to an ISP is separate and distinct from the information service provided by the ISP to its customer.[10] The existence of two different forms of service is one of the bases for the severability of services that dictates that telecommunications terminates when it reaches the ISP. None of the examples cited by Bell Atlantic disproves this contention or contradicts the Commission's conclusion that the telecommunications and information services are separate and distinct.

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[9] *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation,* 7 FCC Rcd 1619 (1992) (*"Georgia Voice Mail Case"), aff'd per curiam sub nom. Georgia PSC v. FCC,* 5 F.3d 1499 (11th Cir. 1993).

[10] *In re Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order ¶83 (rel. May 8, 1997); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, ¶36 (rel. Aug. 7, 1998).

II. Bell Atlantic Misstates the Law of Federal Preemption of State Authority and Mischaracterizes the Nature of the Conflict with States that Will Ensue if Bell Atlantic's Position is Adopted.

In its strained attempt to cram its ADSL service offering solely into a federal jurisdiction pigeonhole, Bell Atlantic stretches the law regarding federal preemption of state authority of intrastate services until it is unrecognizable. To begin with, even accepting, *arguendo*, Bell Atlantic's argument that the telecommunications service from the end user to the ISP continues past the ISP to some indeterminate point on the Internet--and Focal continues to assert that this argument is wrong-- it cannot seriously be questioned that none of this traffic terminates within the same state in which it originates. Therefore, at a minimum, the traffic in question is jurisdictionally mixed, and the FCC must share jurisdiction with the states over the traffic. The Commission could, of course, defer to the regulatory authority of the states for this traffic under Bell Atlantic's theory, or under certain limited circumstances, could seek to preempt state authority. Contrary to Bell Atlantic's suggestion, however, preemption of state authority is not a simple matter. In addition to finding that state and federal components of a service subject to regulation are impossible to separate, it must be determined that the state regulation negates the federal authority over interstate communications, not merely interferes with it, as Bell Atlantic suggests.[11] This "impossibility" exception, however, "is premised on a preemption analysis, and '[t]he critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law.'"[12] Bell Atlantic has

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[11]Bell Atlantic Direct Case at 5-6 (citations omitted); *see Iowa Utilities Board v. FCC*, 120 F.3d 753, 796 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Bd.*, 118 S. Ct. 879 (1998).

[12]*Id.* at 798, *quoting Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

presented no argument whatsoever that Congress *intended* for the FCC to supersede state commissions regarding regulation of services from end users to ISPs.[13] Bell Atlantic's claim for preemption must be denied as a matter of law.[14]

Given that the FCC may not preempt state authority over local traffic from an end user to an ISP, it is unavoidable that any decision that adopts the Bell Atlantic position will create conflicts with the state decisions that have found dial-up traffic from an end user to an ISP to be local and eligible for reciprocal compensation under applicable interconnection agreements. Bell Atlantic is categorically wrong when it claims that "the overwhelming majority of the states that have addressed the issue recognized that the Commission has the final say on whether the traffic is interstate or intrastate[.]" Bell Atlantic Direct Case at 12. The quotations provided by Bell Atlantic of three of these decisions are inconclusive at best, and more likely quite contradictory to Bell Atlantic's position. As the quotations actually demonstrate, those states that even make reference to a pending FCC decision on this issue state that they *may* revisit their decisions and decide what impact, *if any,* an FCC decision may have on their decisions enforcing interconnection agreements with reciprocal compensation provisions. With the possible exception of West Virginia, none of the states has conceded jurisdiction of this matter to the FCC, and many will likely challenge any attempts by the FCC to preempt their authority to regulate a service that appears in every respect to be an intrastate

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[13]Focal finds it odd that Bell Atlantic claims that the FCC's rules regarding reciprocal compensation, and the portions of the memorandum opinion adopting and explaining those rules, are now final, Bell Atlantic Direct Case at 11, when in fact they were vacated by the United States Court of Appeals for the Eighth Circuit at the request of Bell Atlantic and others.

[14]The irony that Bell Atlantic seeks federal preemption of state authority over the local loop for this particular issue while it argues against such federal authority before the United States Supreme Court in the *Iowa Utilities Board* appeal should not be overlooked by the Commission.

service.[15] It should be plain that Bell Atlantic is looking to the FCC, without adequate support at law, for a bailout of its contractual obligations to its emerging competitors.[16] For these reasons, preemption of state authority on this issue is not a foregone conclusion, and as Focal stated in its Comments in the earlier ADSL tariff proceedings, the Commission should refrain from creating any conflicts with valid state commission decisions regarding dial-up traffic from an end user to an ISP, particularly within the narrow context of this ADSL tariff review proceeding.

Respectfully submitted,

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Dated: October 15, 1998

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[15]Note also that NARUC has adopted a resolution stating that local traffic from end users to ISPs is subject to state jurisdiction. NARUC Resolution, "Reciprocal Compensation for Calls to ISPs," adopted July 29, 1998.

[16]The gamesmanship of Bell Atlantic should be evident to the Commission. While Bell Atlantic is quick to deny that it has tariffed ADSL service at the state level, it completely ignores the comment that "DSL services have significant similarities with ISDN services, yet none of the ILECs in this proceeding have tariffed ISDN services at the federal level as exchange access." Focal Comments at 5. The evidence is unmistakable that Bell Atlantic's true interest in this proceeding is to undermine the authority of the states that have required it, and other ILECs, to pay reciprocal compensation for this traffic.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 1998, copies of the foregoing Opposition to Direct Case of Focal Communications Corporation were served by U.S. mail and hand-delivery as indicated below:

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Before the
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In the Matter of	)	
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GTE Telephone Operating Companies	)	
GTOC Tariff FCC No. 1	)	CC Docket No. 98-79
GTOC Trans. No. 1148	)	
	)	
BellSouth Telecommunications, Inc.,	)	
Tariff FCC No. 1 Access Service	)	CC Docket No. 98-161
BellSouth Trans. No. 476	)	
	)	
Pacific Bell Telephone Company	)	
Pacific Bell Tariff FCC No. 128	)	CC Docket No. 98-103
Pacific Trans. No. 1986	)	
	)	
To: Competitive Pricing Division	)	

OPPOSITION TO DIRECT CASES
OF FOCAL COMMUNICATIONS, INC.

Focal Communications, Inc. ("Focal"), by its undersigned counsel, hereby submits its Opposition to the Direct Cases of GTE Telephone Operating Companies ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and Pacific Bell Telephone Company ("Pacific Bell") (collectively, the "Proponents"), which were filed in the above-referenced dockets. Focal filed a Petition to Reject the GTE tariff[1] and opposes the tariffs of the Proponents because the services provided thereunder are not exchange access and, accordingly, the tariffs are not legitimate "exchange access" tariffs. Moreover, to the extent that the proposed DSL services are similar to local dial-up telecommunications services, the telecommunications service from the end user to the

[1]GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148, *Petition to Reject, or to Suspend and Investigate, of Focal Communications, Inc. and ICG Communications, Inc.* (May 22, 1998).

ISP terminates at the ISP, at which point information services begin. The telecommunications service that would be subject to tariffing would be solely intrastate if it was provided to connect an end user to an information service provider. Finally, 21 state commissions have determined that dial-up traffic from an end user to an ISP is local for the purposes of reciprocal compensation under the terms of interconnection agreements. Any ruling by this Commission that in any way contradicted those decisions would raise federal-state conflicts and implicate federal preemption issues that are simply not relevant to the issue before the Commission here.

I. ADSL Service to ISPs is not Exchange Access by Definition

The Commission should reject the ADSL tariffs of Pacific Bell, BellSouth and GTE as defective because the services provided thereunder are not exchange access and, accordingly, the tariffs are not legitimate "exchange access" tariffs. Exchange access is defined by the Communications Act as "the offering of access to telephone exchange services or facilities for the purposes of the origination and termination of telephone toll services." 47 U.S.C. § 153(16). Telephone toll service is defined by the Act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in the contracts with subscribers for exchange service." 47 U.S.C. § 153(48). Although the term "telephone service" is not defined, "telephone exchange service" is defined in the Act. Telephone exchange service is defined, in pertinent part, as "a . . . service provided . . . by which a subscriber can originate and terminate a telecommunications service" within a local exchange. 47 U.S.C. § 153(47). "Telephone service" would reasonably be identical to "telephone exchange service," but not restricted to the local exchange, or simply a service by which a subscriber can originate and terminate any telecommunications service.

Accordingly, in order for the ADSL service provided by the Proponents to be exchange access under the Act, the service provided by the subscriber of exchange access services must be telecommunications service. The services and facilities that the Proponents propose to provide will be purchased primarily by ISPs and will be used to connect local exchange end users to ISPs. The service provided by ISPs, however, is not telephone toll service because it is not telecommunications. As the Commission has recently reported to Congress, ISPs "generally do not provide telecommunications."[2] Instead, ISPs provide information services, of which telecommunications is a component.[3] Information services and telecommunications services are mutually exclusive.[4] Because ISPs do not provide telecommunications, they cannot provide telephone toll service, and the service offerings of the Proponents to ISPs cannot be exchange access as defined by the Act.

The Proponents fare no better under the Commission's definition of "access service." First, the Commission's definition of exchange access or access service can not expand the terms of the statute that such definition is intended to implement. Second, in the Commission's definition, "*'Access Service'* includes services and facilities provided for the origination and termination of any interstate or foreign telecommunications." 47 C.F.R. § 69.2(b). Again, the person to whom "access service" is provided must be a telecommunications provider in order to originate or terminate telecommunications to or from an interstate or foreign location. Because ISPs are not

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[2]In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, FCC 98-67 paras. 15, 55 (rel. Apr. 10, 1998).

[3]*Id.* para. 81.

[4]*Id.* paras. 13, 39.

telecommunications providers, the service they obtain from local exchange carriers cannot be "access service." Under either the Act or the rules of the Commission, the ADSL services proposed by Pacific Bell, BellSouth and GTE are not exchange access.

This is not to say, however, that no ADSL service will fall within the definition of "exchange access" traffic as set forth in the Communications Act of 1934. There may be instances when ADSL could be used to provide end-to-end telecommunications services, for example, when an interexchange carrier subscribes to ADSL to connect its packet network through a local carrier's packet network to reach a customer. With regard to the tariffs in this particular investigation, however, because ISPs provide information services, the Commission must conclude that the ADSL tariffs are not exchange access tariffs and therefore reject them as being defective without answering any of the jurisdictional questions raised in this investigation.

II. To the Extent DSL Services Mirror Local Dial-up Services, DSL Services from an End User to an ISP are Intrastate

It is not at all clear that DSL services are in all respects akin to local dial-up services. While DSL services use the same local loop as local dial-up services, DSL services generate no dial tone, and they completely bypass the circuit-switched network. While dial-up services may be measured in terms of minutes of use, it is clear that the use of DSL services are not measured the same way. Nevertheless, both DSL services and dial-up services are telecommunications, and to the extent that they are alike, DSL services from an end user to an ISP terminate at the ISP. Because these telecommunications services terminate at the ISP within the local exchange, they are intrastate services subject to state regulation.

The telecommunications from the end user to the ISP terminates at the ISP because the ISP

is an end user of telecommunications and a provider of information services. The intrastate call that is delivered to the ISP and any subsequent service that is provided by the ISP are separate and distinguishable services. The *information service* provided by the ISP is wholly separate from the local exchange *telecommunications service* provided by the local exchange carrier.

Further evidence of the local character of the first component of the Internet service is the Commission's treatment of ISPs under the Act. The Commission does not treat ISPs as interexchange carriers, in as much as it does not require ISPs to contribute to the Universal Service Fund, a fund to which *all* interstate carriers must contribute.

In fact, all major means of accessing the Internet currently in use, namely business lines, ISDN and dedicated lines, are tariffed at the state level. Most, if not all, RBOCs charge their own customers local rates for traffic to ISPs and therefore classify such traffic as local for purposes of interstate separations. This is a clear demonstration that the LECs treat the call from its customer to the ISP as a local call.

III. The Commission Should Refrain from Creating Any Conflicts with Valid State Commission Decisions

It should be apparent to the Commission that the reason GTE and the BOCs have filed their tariffs at the FCC on the grounds that their ADSL service is exchange access is to present the Commission with an opportunity to create a conflict with state commission decisions that have ruled that local exchange dial-up traffic from an end user to an ISP is local and eligible for reciprocal compensation under valid interconnection agreements. DSL services have significant similarities with ISDN services, yet none of the ILECs in this proceeding have tariffed ISDN services at the federal level as exchange access. Moreover, GTE has asserted that its ADSL service is exclusively

interstate, contrary to every BOC that has already filed state tariffs for ADSL as an intrastate service. GTE and the BOCs are hoping that, by allowing their federal ADSL tariffs to go into effect and asserting jurisdiction over DSL services provided in the local exchange, the Commission will rule that all traffic from an end user to an ISP is jurisdictionally interstate. The Commission should reject the ILEC gambit for a number of reasons, not the least of which will be the effect such a declaration will have on federal-state relations.

As the Commission is aware, when GTE and the BOCs unilaterally withheld payment of reciprocal compensation for the transport and termination of local exchange traffic from one end user to another end user that happens to be an ISP, which was otherwise due pursuant to valid interconnection agreements that had been approved by state commissions, CLECs were compelled to file complaints with the applicable state commissions. For the past 16 months, CLECs have been squaring off against ILECs for this compensation across the country. To date, 21 state commissions have ruled on the issue, and all 21 have found in favor of CLECs.[5] Every state commission to have considered the issue has found that calls from end users to ISPs are local traffic subject to reciprocal compensation.

On this issue, GTE has said that the Commission need not resolve the reciprocal compensation issue now.[6] At the same time, GTE states, "Of course, the Commission's

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[5]A list of the 21 state decisions is attached as Exhibit 1.

[6]Direct Case of GTE at 7. Bell South claims that state decisions cited by the opponents of its DSL tariff regarding reciprocal compensation for switched calls to ISPs are not relevant to the jurisdictional classification of Bell South's DSL service offering. Bell South Reply at 9; *accord* GTE Reply at 10; Pacific Bell Reply at 9.

jurisdictional analysis here may provide guidance in *future* cases addressing related issues."[7] Whether the "future" cases are the inevitable battles in the remaining 29 states, or the appeals of the 21 decisions, is not clear. Regardless, Bell South has requested that at least one appeal of the state decisions be suspended until the Commission rules in this proceeding.[8] It is clear that BellSouth, GTE, and presumably all other BOCs are hoping for some ruling in this proceeding that can be used against CLECs and state commissions in the struggle over reciprocal compensation for ISP-bound traffic.

Focal recognizes that the Commission has told the North Carolina court that (1) it does not seek the referral of questions relating to interconnection agreements, including whether calls to ISPs are local within the meaning of the reciprocal compensation provisions of the agreements, (2) that any decision in this proceeding may not have an effect on the reciprocal compensation issue, and (3) that the proper construction of agreements previously entered into would not necessarily turn on a subsequent determination by the FCC of the jurisdictional issue.[9] Nevertheless, the Commission should be acutely aware of the possible consequences of a ruling that could be argued by GTE and the BOCs as an endorsement of their position regarding reciprocal compensation for dial-up traffic

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[7]GTE Direct Case at n.16 (emphasis added).

[8]Motion for Primary Jurisdiction Referral, *BellSouth Telecomms. v. US LEC of North Carolina,* No. 3:98CV170-MU (W.D.N.C. Aug. 4, 1998). Although not a party to this proceeding, Ameritech has filed similar motions seeking to defer resolution of its own appeals until the Commission has ruled in this case. Motion for Primary Jurisdiction Referral or, in the Alternative, for Reconsideration, *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.,* Case No. 98 C 1295 (N.D.Ill. Aug. 14, 1998). Ameritech's Motion in Illinois was denied.

[9]Response of Federal Communications Commission as Amicus Curiae, *BellSouth Telecomms v. US LEC of North Carolina*, No. 3:98CV170-MU (W.D.N.C. Aug. 27, 1998) ("*FCC Amicus Curiae Brief*") [attached hereto as Exhibit 2].

from an end user to an ISP. As a threshold matter, it is important to recognize, and for the Commission to state, that any ruling here that could be interpreted to spill over to effect dial-up traffic will not reverse the decisions of state commissions interpreting interconnection agreements between CLECs and ILECs. The Commission should understand that any such decision will no doubt be used by the BOCs and GTE in an effort to complicate enforcement of those decisions, to which ILECs have been loathe to comply.

Although federal preemption of state telecommunications regulation may be available in some narrow circumstances, it is not appropriate here. The FCC may preempt the states "only when (1) it is impossible to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation would negate the FCC's lawful authority over interstate communications."[10] At issue in the decisions to date is state regulation of dial-up traffic in connection with the enforcement of interconnection agreements. The Commission has recognized that states have exclusive jurisdiction over the enforcement of interconnection agreements.[11] If the Commission were to preempt the states on this issue, its preemption authority would not apply to the interpretation or enforcement of interconnection agreements.[12]

Even if federal preemption were somehow appropriate – and it is not – the Commission's

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[10]*Iowa Utils. Bd.*, 120 F.3d at 796.

[11]*FCC Amicus Curiae Brief* at 2, 6.

[12]A number of the state decisions have been decided solely on the language of the interconnection agreements without reliance on FCC interpretation of applicable law whatsoever. *See* In re WorldCom, et. al v. BellSouth Telecomms., Inc., Docket No. 971478-TP, *Final Order Resolving Complaints*, PSC-98-1216-FOF-TP (Sep. 15, 1998)[attached hereto as Exhibit 3]; *Illinois Bell Tel. Co. v. WorldCom Techs., Inc., etc., et al.*, No. 98 C 1925 (Jul. 21, 1998) [attached hereto as Exhibit 4].

exercise of preemption authority would no doubt be challenged by many, if not all, of the states whose jurisdiction was preempted. The traffic in question in the reciprocal compensation cases -- dial-up traffic from one local exchange service number to another local exchange service number -- is *prima facie* local traffic. The fence between federal and state jurisdiction created by Section 2(b) of the Communications Act, already difficult to hurdle pursuant to *Iowa Utilities Board v. FCC,* is all the more difficult to clear when the traffic in question looks local, is provided on a local basis, is considered local for separations purposes, and is billed as local by the ILECs that want to call it interstate. Although the Proponents may be seeking a single, uniform ruling from the FCC, a declaration that local dial-up traffic to ISPs is not local will in fact result in additional costly, time-consuming litigation.

Finally, twenty-one states have already deemed dial-up traffic from an end user to an ISP to be local for the purposes of reciprocal compensation. The traffic in question in this proceeding, DSL traffic, is not dial-up traffic. There is no reason for the Commission to create a conflict over dial-up telephone traffic when the issue here can be resolved without deciding the reciprocal compensation issue that to date has been solely decided by the states. In order to avoid even the trace of a conflict with the state decisions, if the Commission determines that DSL traffic has interstate applications that fall within its jurisdiction, it should also recognize that there are significant differences between DSL traffic and dial-up traffic to ISPs so as to dispose of any challenges to the jurisdiction of dial-up traffic.

IV. Conclusion

The services provided under the tariffs of the Proponents are not exchange access and, accordingly, the tariffs are not legitimate "exchange access" tariffs. For the reasons stated above,

the Commission should reject the interstate ADSL tariffs under investigation in each of the above-referenced dockets. In the event that the Commission does not reject the ADSL tariffs, any ruling approving the tariffs must be narrowly tailored to apply solely to DSL traffic so as to avoid any conflict with state commission decisions addressing dial-up traffic to ISPs and avoid unnecessary consideration of the Commission's preemption authority under these circumstances.

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Dated: September 18, 1998

Counsel for Focal Communications, Inc.

EXHIBIT 1

LIST OF STATES FINDING CALLS TO ISPS TO BE LOCAL

STATE COMMISSION DECISIONS REGARDING RECIPROCAL COMPENSATION FOR LOCAL TRAFFIC TO INTERNET SERVICE PROVIDERS

1. **ARIZONA:** *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 *et al.* (Az. C.C. Oct. 29, 1996) at 7. US West has appealed the decision on other issues to the United States District Court for the District of Arizona, Docket Nos. U-3021-96-448 (consol.).

2. **COLORADO:** *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.,* Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Co. PUC Nov. 5, 1996) at 30. The Colorado Public Utilities Commission has since affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. *The Investigation and Suspension of Tariff Sheets Filed by U S West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services,* Docket No. 96A-331T, Commission Order, at 8 (Co. PUC July 16, 1997). US West has appealed the arbitration decision to the United States District Court for the District of Colorado, Civil Action Nos. 97-D-152 (consol.).

3. **WASHINGTON:** *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252,* Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26; The U.S. District Court for the Western District of Washington upheld the WUTC decision. In its decision, the District Court stated that the WUTC decision not to change the current treatment of ESP calls as eligible for reciprocal compensation is "properly based on FCC regulations which exempt ESP providers from paying access charges." *U S West Communications, Inc. v. MFS Intelenet, Inc. et al.*, Order, No. C97-222WD (W.D. Wash. January 7, 1998) at 8 (Citing 47 C.F.R. Part 69). US West has appealed the district court decision to the United States Court of Appeals for the Ninth Circuit, Case No. CV-97-00222-WLD.

4. **MINNESOTA:** *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76. US West has appealed the arbitration decision to the United States District Court for the District of Minnesota, Civil Action No. 97-913 MJD/AJB.

5. **OREGON:** *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996,* Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13. US West has appealed the arbitration decision to the United States District Court for the District of Oregon, Civil Action No. CV97-857-JE.

6. **NEW YORK:** When WorldCom filed a complaint with the New York Public Service Commission ("NYPSC") after New York Telephone (now owned by Bell Atlantic) began to unilaterally withhold payment of reciprocal compensation for local exchange traffic delivered to ISPs served by WorldCom, the NYPSC ordered New York Telephone to continue to pay reciprocal compensation for such traffic. *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic,* Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y. PSC. July 17, 1997). The Order also instituted a proceeding to consider issues related to Internet access traffic. On December 17, 1997, the New York Commission approved a Recommendation in that proceeding. Public Session of the Public Service Commission, December 17, 1997 (N.Y. PSC) at 14-15. *See also,* Order Closing Proceeding, (NYPSC March 19, 1998).

7. **MARYLAND:** The Maryland Public Service Commission ruled on September 11, 1997 that local exchange traffic to ISPs is eligible for reciprocal compensation. Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. On October 1, 1997, the Commission rejected Bell Atlantic's petition for reconsideration. Bell Atlantic appealed the decision to the Circuit Court for Montgomery County (CA No. 178260); the Circuit Court upheld the Commission decision. A written decision is not available.

8. **CONNECTICUT:** The Connecticut Department of Public Utility Control has also concluded that these calls are subject to reciprocal compensation. *Petition of the Southern New England Telephone Company For a Declaratory Ruling Concerning Internet Service Provider Traffic*, Docket No. 97-05-22 (Conn. DPUC Oct. 10, 1997) at 11.

9. **VIRGINIA:** The Virginia State Corporation Commission reached the same conclusion. *Petition of Cox Virginia Telcom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. Oct. 24, 1997) at 2; Notice of Appeal Withdrawn.

10. **TEXAS:** On February 5, 1998, the Texas Public Utility Commission reversed an arbitrator's ruling and found that calls made by Southwestern Bell Telephone's end users that terminated to ISPs on competitors' networks are local calls entitled to reciprocal compensation under interconnection agreements. *Complaint and Request for Expedited Ruling of Time Warner Communications,* Order, PUC Docket 18082 (TX PUC, February 27, 1998). As the Commission's Chairman concluded, ". . . I do feel comfortable that (a) we have jurisdiction; that (b) these are local calls that should be compensated accordingly; and that (c) I don't really see any ability or desire on my part to undo a business contract." *Id.* at 23. The

United States District Court for the Western District of Texas affirmed the Commission decision. *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas,* Case No. MO-98-CA-43, June 22, 1998.

11. **WEST VIRGINIA:** The West Virginia Commission also concluded that "calls that originate and are terminated to ISPs in local calling areas are treated as local traffic -- regardless of whether the ISP reformats or retransmits information received over such calls to or from further interstate (or international) destinations." *Petition For Arbitration of Unresolved Issues For the Interconnection Negotiations Between MCI and Bell Atlantic - West Virginia, Inc.*, Order, Case No. 97-1210-T-PC (W.Va. PSC Jan. 13, 1998) at 29.

12. **MICHIGAN:** On January 28, 1998, the Michigan Public Service Commission concluded that Ameritech's withholding of reciprocal compensation in Michigan violated its interconnection agreements. *Consolidated Petitions of Brooks Fiber Communications of Michigan, Inc., TCG Detroit, MFS Intelenet of Michigan, Inc, and Brooks Fiber Communications of Michigan, Inc. against Michigan Bell Telephone Company, d/b/a Ameritech Michigan and Request for Immediate Relief,* Order, Case Nos. U-11178, U-11502, U-11522, U-11553 (Mich. PSC Jan. 28, 1998) at 1. The Commission held that FCC precedent, the interconnection agreements "on their face," and Ameritech's conduct and implementation of the interconnection agreements "fully support a conclusion that those agreements require reciprocal compensation for calls to ISPs." *Id.* at 8, 11, 14-15. Ameritech has appealed the Commission decision to the United States District Court for the Western District of Michigan, Case No. 5:98-CV-18.

13. **NORTH CAROLINA:** *In the Matter of Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC,* Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, Sub 1027 (N.C. Util. Comm. Feb. 26, 1998) at 6. BellSouth has appealed the Commission decision to the United States District Court for the Western District of North Carolina, Civil Action No. 3:98CV170H.

14. **ILLINOIS:** *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois, et al.*, Docket Nos. 97-0404, 97-0519, 97-0525 (Consol.), Order, (Ill. C.C. Mar. 11, 1998) at 15. The United States District Court for the Northern District of Illinois affirmed the Commission's decision. *Illinois Bell Telephone v. WorldCom Technologies, Inc.*, Case No. 98-C-1925, Memorandum Opinion and Order, July 21, 1998.

15. **MISSOURI:** The Missouri Public Service Commission found that calls to ISPs should be treated and compensated as if they are local calls by the parties pending the FCC's final determination of the issue. *In the Matter of the Petition of Birch Telecom of Missouri, Inc. For Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell Telephone Company,* Arbitration Order, Case No. TO-98-278 (Mo. P.S.C. Apr. 23, 1998) at 8.

16. **WISCONSIN:** The Wisconsin Public Service Commission found that calls to an Internet service provider are local traffic - not switched exchange access service – under an applicable

interconnection agreement. *Re: Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG-Milwaukee, Inc.* Letter from Lynda L. Dorr, Secretary to the Commission, Public Service Commission of Wisconsin, to Rhonda Johnson and Mike Paulson, dated May 13, 1998. Ameritech has appealed the decision to the United States District Court for the Western District of Wisconsin, Civil Action No. 98 C 0366 C.

17. **OKLAHOMA:** *In the Matter of Brooks Fiber Communications of Oklahoma, Inc. et al. For An Order Concerning Traffic Terminating To Internet Service Providers and Enforcing Provisions of the Interconnection Agreement With Southwestern Bell Telephone Company,* Case No. PUD 970000548, Order No. 423626 (June 3, 1998).

18. **PENNSYLVANIA:** *Petition for Declaratory Order of TCG Delaware Valley, Inc.*, Docket No. P-00971256, (June 16, 1998).

19. **TENNESSEE:** *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief,* Docket No. 98-00118, voted to Affirm Hearing Officer, June 2, 1998.

20. **FLORIDA:** *Complaint of World[Com] Technologies, Inc. Against BellSouth Telecommunications, Inc., for Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief,* Docket No. 971478-TP, Final Order Resolving Complaints, Order No. PSC-98-1216-FOF-TP (Fla. PSC Sep. 15, 1998).

21. **OHIO:** *Complaint of ICG Telecom Group, Inc., v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation,* Case No. 97-1557-TP-CSS, Opinion and Order (PUCO, Aug. 27, 1998).

EXHIBIT 2

AMICUS BRIEF OF F.C.C.

BellSouth Telecommunications v. US LEC of North Carolina
No. 3:98CV170-MU (W.D.N.C. Aug. 27, 1998)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

BellSouth Telecommunications, Inc. Plaintiff,	)	
v.	)	Civil Action No. 3:98CV170-MU
US LEC of North Carolina, L.L.C., and The North Carolina Utilities Commission, Defendants.	)	

RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE TO MOTION FOR REFERRAL OF ISSUE

The Federal Communications Commission respectfully submits this response as amicus curiae to the "Memorandum of Plaintiff BellSouth Telecommunications, Inc. in Support of Primary Jurisdiction Referral," filed with the Court on August 4, 1998. In its Memorandum, BellSouth asks this Court to refer to the FCC, under the doctrine of primary jurisdiction, two issues in this case: the proper jurisdictional treatment of calls made to the Internet through Internet service providers (ISPs), and whether such calls are subject to the reciprocal compensation requirements of section 251(b)(5) of the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251(b)(5). Without taking a position on BellSouth's request for referral of the jurisdictional issue, the FCC notes that the question whether calls to ISPs are subject to FCC jurisdiction already is before the FCC in ongoing proceedings and will be addressed by the agency promptly in those proceedings. In addition, the FCC does not seek referral of any issues relating to the enforcement of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252 of the Act, including whether calls to ISPs are "local" calls within the meaning of the reciprocal

compensation provisions in BellSouth's interconnection agreement with US LEC of North Carolina. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997) (holding that, except in limited circumstances, the FCC lacks jurisdiction to enforce the terms of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252), cert. granted, 118 S. Ct. 879 (1998).[1]

A. BACKGROUND.

Although the 1984 breakup of the Bell System helped spur the growth of competition in the long distance telephone market, the incumbent local exchange carriers ("LECs") retained monopoly control of local telephone markets. In almost every city or town in the United States, a single incumbent LEC, by virtue of its ownership of the local exchange network, controls local exchange service. Because that network also is the gateway to long distance service, the same incumbent LEC also has control over access by callers to that competitive market.

Congress addressed the competitive structure of telecommunications markets in the Telecommunications Act of 1996.[2] Congress sought to end the incumbent LECs' monopoly control over local and long distance access service markets, creating instead a "pro-competitive, de-regulatory national policy framework" with the goal of "opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d

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[1] The Commission and other parties petitioned the Supreme Court for a writ of *certiorari* to review the *Iowa* decision, and the Supreme Court granted those petitions. 118 S. Ct. 879 (1998). Argument before the Supreme Court will be held on October 13, 1998.

[2] P.L. 104-104, 110 Stat. 56, enacted February 8, 1996. The 1996 Act amends the Communications Act of 1934, which is codified at 47 U.S.C. § 151, et seq.

Sess. 1 (1996). As part of this framework, Congress required incumbent LECs to permit their competitors (competitive LECs, or "CLECs") to interconnect with the local network, to have the use of "unbundled" elements of the network, and to buy local service at wholesale rates for resale to end users. 47 U.S.C. § 251(c)(2)-(4). The CLECs were expected to compete with the ILECs for local as well as local exchange access business.

The 1996 Act also required all LECs (incumbents as well as CLECs) to establish "reciprocal compensation arrangements [with other LECs] for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC has interpreted this provision to apply only to the transport and termination of "local telecommunications traffic."[3] Although the United States Court of Appeals for the Eighth Circuit vacated in part the FCC's reciprocal compensation rules, see Iowa Utils. Bd. v. FCC, 120 F.3d 753, a number of state public utility commissions also have interpreted section 251(b)(5) to apply only to local telecommunications traffic. As required by the statute, carriers across the country (such as the parties to this

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[3] E.g., 47 C.F.R. § 51.701(e)(emphasis added):

> [A] reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

See also 47 C.F.R. § 51.703(a). The FCC defined "local telecommunications traffic" for this purpose as "[t]elecommunications traffic between a LEC and a telecommunications carrier ... that originates and terminates within a local service area established by a state commission ...." 47 C.F.R. § 51.701(b). Although these rules were among those vacated by the Eighth Circuit, they were not disturbed to the extent that they apply to Commercial Mobile Radio Service providers. 120 F.3d at 819 n.39.

case) have included provisions in their interconnection agreements providing for reciprocal compensation for local telecommunications traffic. See, e.g., BellSouth Memorandum at 2 (quoting BellSouth-US LEC Interconnection Agreement § IV.B)("[e]ach party will pay the other for terminating its local traffic on the other's network") (emphasis added).

This case arises out of a dispute between BellSouth and US LEC over the application of the reciprocal compensation provision in their agreement in North Carolina. That agreement requires each party to pay "reciprocal compensation" to the other "for terminating its local traffic on the other's network." Interconnection Agreement, § IV.B. BellSouth and US LEC disagree about whether calls made from a customer of one of the carriers to the Internet through an Internet Service Provider ("ISP") that is served by the other carrier are local calls subject to reciprocal compensation. The North Carolina Utilities Commission ("NCUC"), acting in an enforcement action brought by US LEC to obtain payment from BellSouth for these calls, ruled that calls to ISPs are local calls and that US LEC is entitled to reciprocal compensation for that traffic under the agreement. See Order Concerning Reciprocal Compensation for ISP Traffic, Docket P-55, Sub. 1027, at 6-7 (N.C. Util. Comm'n, Feb. 26, 1998). BellSouth filed a petition for review of the NCUC ruling in this Court. It later filed a motion to stay the proceeding "to permit referral of the controlling legal issue" to the FCC under the doctrine of primary jurisdiction.

B. PENDING FCC PROCEEDINGS.

Although the FCC has not yet expressly addressed the question whether calls to the Internet through ISPs are "local" calls, questions regarding the proper jurisdictional treatment of calls to the Internet have been raised in a number of proceedings currently pending before

the FCC. On May 15, 1998, GTE filed an interstate access tariff with the FCC to establish a new digital subscriber line (DSL) service offering that provides a high speed access connection between an end user subscriber and an ISP.[4] The Common Carrier Bureau has issued an order designating for investigation the threshold issue whether GTE's DSL service is properly tariffed at the federal level.[5] The FCC will issue an order concluding this investigation no later than October 30, 1998.[6] Also pending before the agency are requests filed by MFS Communications Company, Inc. ("MFS"), a CLEC, and the Association for Local Telecommunications Services ("ALTS"), a trade association that represents CLECs, that the FCC clarify whether the reciprocal compensation obligations of section 251(b)(5) of the Act apply to calls made to CLEC subscribers that are ISPs, in response to which the FCC must resolve the threshold question whether calls to ISPs are subject to FCC jurisdiction.[7]

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[4] In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (filed May 15, 1998, to become effective May 30, 1998).

[5] In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Order Designating Issues for Investigation, DA 98-1667(released August 20, 1998).

[6] See 47 U.S.C. § 204(a)(2)(A) (five-month statutory deadline for orders concluding tariff investigations).

[7] See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Pleading Cycle Established for Comments on Request by ALTS for Clarification, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 FCC Rcd 9715 (released July 2, 1997). Although ALTS recently filed a letter with the Common Carrier Bureau seeking to withdraw its request for clarification, the issue ALTS raised remains pending before the Commission pursuant to the MFS petition and the agency's authority on its own motion to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. See also 5 U.S.C. § 554(e).

C. APPROPRIATE ACTION IN THIS CASE.

Several proceedings now pending before the agency pose the question whether calls to the Internet through ISPs are subject to FCC jurisdiction. The Commission will address this issue in the context of GTE's DSL tariff no later than October 30, 1998. It is unclear whether, or the extent to which, the FCC's resolution of the jurisdictional issue in the GTE tariff proceeding will be relevant to the proper treatment of ISP traffic under the terms of the interconnection agreement between BellSouth and US LEC. The FCC notes that the jurisdictional issue before it in the tariff proceeding does not involve application of the reciprocal compensation provisions of section 251(b)(5) or interpretation of the terms of an interconnection agreement.[8] Moreover, the proper construction of the specific compensation agreement previously entered into between the parties would not necessarily turn on a subsequent determination by the FCC with respect to its jurisdiction over ISP traffic.

Accordingly, the FCC takes no position on BellSouth's motion for a primary jurisdiction referral of the jurisdictional question and also does not seek referral of questions relating to the enforcement of particular provisions of BellSouth's interconnection agreement with US LEC, including whether calls to ISPs are "local" calls within the meaning of the reciprocal compensation provisions of that agreement. See Iowa Utils. Bd., 120 F.3d at 804.

Respectfully submitted,

PHILIP D. BARTZ
Acting Assistant Attorney General
Civil Division

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[8] See Iowa Utils. Bd., 120 F.3d at 804 (FCC lacks jurisdiction, except in limited circumstances, to enforce interconnection agreements under section 251 and 252).

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CERTIFICATE OF SERVICE

I, Brian G. Kennedy, hereby certify that on this 27th day of August, 1998, I caused the foregoing Response Of Federal Communications Commission as Amicus Curiae to Motion For Referral Of Issue, to be served via postage prepaid mailing to:

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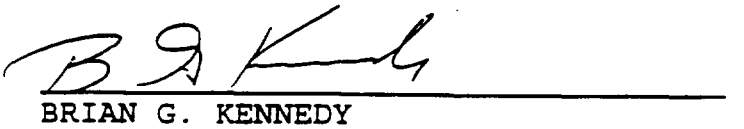

BRIAN G. KENNEDY

EXHIBIT 3

In re WorldCom, et. al v. BellSouth Telecomms., Inc.
Docket No. 971478-TP, *Final Order Resolving Complaints*, PSC-98-1216-FOF-TP
(Sep. 15, 1998)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief.	DOCKET NO. 971478-TP ORDER NO. PSC-98-1216-FOF-TP ISSUED: September 15, 1998
Complaint of Teleport Communications Group Inc./TCG South Florida against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Section 252 of the Telecommunications Act of 1996, and request for relief.	DOCKET NO. 980184-TP
Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.	DOCKET NO. 980495-TP
Complaint by MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement by failure to pay compensation for certain local traffic.	DOCKET NO. 980499-TP

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

FINAL ORDER RESOLVING COMPLAINTS

APPEARANCES:

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On behalf of BellSouth Telecommunications, Inc.

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On behalf of the Commission Staff.

CASE BACKGROUND

MFS Communications Company, Inc. (MFS), and BellSouth Telecommunications, Inc. (BellSouth), entered into a Partial Florida Interconnection Agreement pursuant to the Telecommunications Act of 1996 (Act) on August 26, 1996. The Commission approved the Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP. The Commission approved an amendment to the Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP. On November 12, 1997, WorldCom Technologies, Inc. (WorldCom), filed a Complaint Against BellSouth and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to Internet Service Providers (ISPs). The complaint was assigned Docket No. 971478-TP. BellSouth filed its Answer and Response on December 22, 1997. In Order No. PSC-98-0454-PCO-TP, issued March 31, 1998, the Commission directed that the matter be set for hearing.

Teleport Communications Group, Inc./TCG South Florida (TCG), and BellSouth entered into an Interconnection Agreement pursuant to the Act on July 15, 1996. The Commission approved the Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP. On February 4, 1998, TCG filed a Complaint for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth, also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISPs. The complaint was assigned Docket No. 980184-TP. BellSouth filed its Answer and Response on February 25, 1998.

MCImetro Access Transmission Services, Inc. (MCIm), and BellSouth entered into an Interconnection Agreement pursuant to the Act on April 4, 1997. The Commission approved the Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-97-0723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP. On February 23, 1998, MCIm filed a Complaint against BellSouth, which was assigned Docket No. 980281-TP. Among other things, MCIm also alleged in Count 13 that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCIm to ISPs. On April 6, 1998, MCIm filed a separate Complaint embodying the complaint set forth in Count 13 of the first Complaint. The separate complaint was assigned Docket No. 980499-TP.

Intermedia Communications, Inc. (Intermedia), and BellSouth entered into an interconnection Agreement pursuant to the Act on July 1, 1996. The Commission approved the Agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769-TP. The Commission approved an amended Agreement in Order No. PSC-97-1617-FOF-TP, issued December 30, 1997, in Docket No. 971230-TP.

On April 6, 1998, Intermedia filed a Complaint against BellSouth alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISPs. That complaint was assigned Docket No. 980495-TP.

On March 9, 1998, GTE Florida Incorporated (GTEFL) filed a petition to intervene in this proceeding. By Order No. PSC-98-0476-PCO-TP, we denied GTEFL's petition. Subsequently, on May 6, 1998, GTEFL filed a petition to be permitted to file a brief. We denied that petition at the commencement of the hearing in these complaint dockets.

By Order No. PSC-98-0561-PCO-TP, issued April 21, 1998, the four complaints were consolidated for hearing purposes. The hearing was held on June 11, 1998.

DECISION

This case is about BellSouth's refusal to pay reciprocal compensation for the transport and termination of ISP traffic under the terms of its interconnection agreements with WorldCom, Teleport, Intermedia, and MCIm. In a letter dated August 12, 1997, BellSouth notified the complainants that it would not pay compensation for the termination of ISP traffic, because "ISP traffic is jurisdictionally interstate" and "enjoys a unique status, especially [as to] call termination." The case is primarily a contract dispute between the parties, and that is the foundation of our decision below. As TCG stated in its brief, "This is a contract dispute in which the Commission must decide whose meaning is to be given to the term 'Local Traffic' in the Agreement."

Accordingly, in this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts. Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes.

While there are four complainants in the consolidated case, their arguments contain many common threads. Also, BellSouth's position on each issue is the same, and its brief addresses all four together. For the sake of efficiency, we will address the main themes in our discussion of the WorldCom-BellSouth agreement. We will address the particular language of the other agreements separately.

The WorldCom-BellSouth Agreement

On August 26, 1996, MFS (now WorldCom) and BellSouth entered into a Partial Interconnection Agreement, which we approved in Order No. PSC-96-1508-FOF-TP. WorldCom witness Ball testified on the pertinent provisions of that Agreement. Section 1.40 of the Agreement defines local traffic as:

> [C]alls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area [such as EAS]. Local traffic includes traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 5.8.1 provides that:

> Reciprocal Compensation applies for transport and termination of Local Traffic (including EAS and EAS-like traffic) billable by BellSouth or MFS which a Telephone Exchange Service Customer originates on BellSouth's or MFS's network for termination on the other Party's network.

The question presented for decision is, as it is in the other complaints, whether, under the WorldCom - BellSouth Florida Partial Interconnection Agreement, the parties are required to compensate each other for transport and termination of traffic to Internet Service Providers; and if they are, what relief should the Commission grant? The issue is whether the traffic in question, ISP traffic, is local for purposes of the agreements in question.

According to witness Ball, the language of the WorldCom-BellSouth Agreement itself makes it clear that the parties owe each other reciprocal compensation for the traffic in question. He stated that "if a BellSouth customer utilizes a BellSouth telephone exchange service that has a local NPA-NXX and they call a WorldCom customer that buys a WorldCom telephone exchange service that has a WorldCom NPA-NXX, that's local traffic." Witness Ball explained that this is what happens when a BellSouth local customer calls a WorldCom customer that happens to be an ISP. He pointed out that

there is no exclusion for any type of customer based on what business the customer happens to be in. Witness Ball noted that where exceptions were needed for certain types of traffic, they were expressly included in the Agreement. He argued that WorldCom understood ISP traffic to be local, and if BellSouth wanted to exclude ISP calls, it was BellSouth's obligation to raise the issue at the time the Agreement was negotiated.

Witness Ball stated that "the Agreement is entirely clear and unambiguous" on the treatment of ISP traffic as local; but if we determine that the Agreement is ambiguous on this point, the ambiguities should be resolved by considering:

(1) the express language of the Telecommunications Act of 1996;

(2) relevant rulings, decisions and orders of this Commission;

(3) relevant rulings, decisions and orders of the FCC interpreting the Act;

(4) rulings, decisions and orders from other, similarly situated state regulatory agencies; and

(5) the custom and usage in the industry.

BellSouth witness Hendrix agreed that the contract did not specify whether ISP traffic was included in the definition of local traffic. Witness Hendrix argued, however, that it was WorldCom's obligation to raise the issue in the negotiations. In fact, the record shows that while BellSouth and the complainants all reached a specific agreement on the definition of local traffic to be included in the contracts, none of them raised the particular question of what to do with ISP traffic.

According to BellSouth, all the complainants assumed that BellSouth agreed to include ISP traffic as local. BellSouth asserts that it cannot be forced to pay reciprocal compensation just because it did not "affirmatively except ISP traffic from the definition of 'local traffic'" in negotiating the Agreement. BellSouth argues that the existing law at the time the contracts were negotiated "reflects that it was unreasonable for the Complainants to blithely assume that BellSouth agreed with their proposed treatment of ISP traffic."

It appears to us from our review of the record, however, that BellSouth equally assumed, and implied in its brief and testimony at the hearing, that the complainants in fact knew ISP traffic was

interstate in nature. In its brief, BellSouth states that "parties to a contract are presumed to enter into their Agreement with full knowledge of the state of the existing law, which in turn is incorporated into and sheds light on the meaning of the parties' Agreement." BellSouth witness Hendrix asserted that the FCC had explicitly found that ISPs provide interstate services. Therefore, witness Hendrix argued, there was no need for BellSouth to believe ISP traffic would be subject to reciprocal compensation. The result of this misunderstanding, BellSouth asserts, was that the parties never had an express meeting of the minds on the scope of the definition of local traffic.

Discussion

Upon review of the language of the agreement, and the evidence and testimony presented at the hearing, we find that the Agreement defines local traffic in such a way that ISP traffic clearly fits the definition. Since ISP traffic is local under the terms of the Agreement, then, a priori, reciprocal compensation for termination is required under Section 5.8 of the Agreement. There is no ambiguity, and there are no specific exceptions for ISP traffic. Since there is no ambiguity in the language of the agreement, we need not consider any other evidence to determine the parties' obligations under the agreement. Even if there were an ambiguity in the language of the agreement, however, the other evidence and argument presented at the hearing leads to the same result: the parties intended to include ISP traffic as local traffic for purposes of reciprocal compensation under their agreement.

Local vs. Interstate Traffic

The first area to explore is the parties' basis for considering ISP traffic to be jurisdictionally local or interstate. BellSouth witness Hendrix contended that for reciprocal compensation to apply, "traffic must be jurisdictionally local." He argued that ISP traffic is not jurisdictionally local, because the FCC "has concluded that enhanced service providers, of which ISPs are a subset, use the local network to provide interstate services." He added that they do so just as facilities-based interexchange carriers and resellers use the local network to provide interstate services. He stated that "[t]he FCC stated in Paragraph 12 in an order dated February 14, 1992, in Docket Number 92-18, that:

> Our jurisdiction does not end at the local switch, but continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself, rather than the physical location of the technology.

Further, according to Witness Hendrix, in its April 10, 1998, Report to Congress (CC Docket No. 96-45), "the FCC indicated that it does have jurisdiction to address whether ALECs that serve ISPs are entitled to reciprocal compensation." We will discuss that report in more detail below.

BellSouth does acknowledge in its brief that the "FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission." Nor has the FCC "held that ISPs are end users for all regulatory purposes." We agree with this assessment. The FCC has not yet decided whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider these services severable from telecommunications services, as we explain below. No FCC order delineates exactly for what purposes the FCC intends ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads us to believe the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise. Even Witness Hendrix agreed that the FCC intended ISP traffic to be treated as though local. He did not expound on what exactly that meant.

BellSouth contends in its brief that there is no dispute that an Internet transmission may simultaneously be interstate, international and intrastate. BellSouth also contends that the issue should be resolved in pending proceedings before the FCC. Those proceedings include one the FCC initiated in response to a June 29, 1997, letter from the Association for Local Telecommunications Services (ALTS). ALTS requested clarification from the FCC that ISP traffic is within the FCC's exclusive jurisdiction. ALTS has also asked the FCC for a ruling on the treatment of ISP traffic as local.

Regardless of what the FCC ultimately decides, it has not decided anything yet, and we are concerned here with an existing interconnection agreement, executed by the parties in 1996. Our finding that ISP traffic should be treated as local for purposes of the subject interconnection agreement is consistent with the FCC's treatment of ISP traffic at the time the agreement was executed, all pending jurisdictional issues aside.

Termination

In its brief, BellSouth places considerable emphasis on the point of termination for a call. The basic question is whether or not ISP traffic terminates at the ALEC premises. Witness Hendrix testified that "call termination does not occur when an ALEC,

serving as a conduit, places itself between BellSouth and an ISP." "[I]f an ALEC puts itself in between BellSouth's end office and the Internet service provider, it is acting like an intermediate transport carrier or conduit, not a local exchange provider entitled to reciprocal compensation." "Thus, the call from an end user to the ISP only transits through the ISP's local point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals between the end user and the host computers." BellSouth states in its brief that "the jurisdictional boundaries of a communication are determined by its beginning and ending points, and the ending point of a call to an ISP is not the ISP switch, but rather is the database or information source to which the ISP provides access."

MCIm contends in its brief that BellSouth witness Hendrix' testimony that a call to an ISP terminates not at the local telephone number, but rather at a distant Internet host misunderstands the nature of an Internet call. MCIm witness Martinez contended that the ability of Internet users to visit multiple websites at any number of destinations on a single call is a clear indication that the service provided by an ISP is enhanced service, not telecommunications service. According to MCIm, this does not alter the nature of the local call. While BellSouth would have one believe that the call involved is not a local call, MCIm points out that in the case of a rural customer using an IXC to connect with an ISP, the call "is suddenly two parts again: a long distance call, for which BellSouth can charge access, followed by an enhanced service."

BellSouth argues in its brief that "in interpreting the language of a contract, words referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning." We agree, but it appears to us that BellSouth then chooses to ignore the industry standard definition of the word "termination." The other parties provided several examples of industry definitions on this point.

WorldCom witness Ball stated that "[s]tandard industry practice is that a call is terminated essentially when it's answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by--whether it's a voice grade phone, if it's a fax machine, an answering machine or, in the case of an ISP, a modem."

TCG witness Kouroupas testified that the standard industry definition of "service termination point" is:

> Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable

> tariffs.... In a switched communications system, the point at which common carrier service ends and user-provided service begins, i.e. the interface point between the communications systems equipment and the user terminal equipment, under applicable tariffs.

Witness Kouroupas further explained that "A call placed over the public switched telecommunications network is considered 'terminated' when it is delivered to the telephone exchange bearing the called telephone number." Call termination occurs when a connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated. This is the case whether the call is received by a voice grade phone, a fax machine, an answering machine, or in the case of an ISP, a modem. Witness Kouroupas contended that this is a widely accepted industry definition.

MCIm argues in its brief that:

> a "telephone call" placed over the public switched telephone network is "terminated" when it is delivered to the telephone exchange service premise bearing the called telephone number... specifically, in its Local Competition Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶1040), the FCC defined terminations "for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." MCIm terminates telephone calls to Internet Service Providers on its network. As a communications service, a call is completed at that point, regardless of the identity or status of the called party.

Witness Martinez testified that "[w]hen a BellSouth customer originates a telephone call by dialing that number, the telephone call terminates at the ISP premises, just as any other telephone call terminates when it reaches the premises with the phone number that the end user dialed."

Severability

Recent FCC documents have described Internet traffic as calls with two severable parts: a telecommunications service part, and an enhanced service part. In the May 1997 Universal Service Order at ¶789, the FCC stated:

> When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

In that Report, the FCC also stated that ISPs "generally do not provide telecommunications." (¶¶ 15, 55) WorldCom argues in its brief that:

> The FCC's determination that ISPs do not provide telecommunications was mandated by the 1996 Act's express distinction between telecommunications and information services. "Telecommunications" is "The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. Section 153(48). By contrast, "information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. Sec. 153(20)

WorldCom adds that:

> [t]he FCC recognized that the 1996 Act's distinction between telecommunications and information services is crucial. The FCC noted that "Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services" <u>despite the appearance from the end user's perspective</u> that it is a single service because it may involve telecommunications components. (<u>Report to Congress</u>, ¶¶56, 58) [Emphasis supplied by WorldCom]

BellSouth argues that the complainants misinterpret the FCC's decision. BellSouth points out that this passage is only discussing whether or not ISPs should make universal service contributions. That is true; but the passage is nevertheless as significant an indication of how the FCC may view ISP traffic as the passages BellSouth has cited.

In its brief, BellSouth claims that the FCC "specifically repudiated" the two-part theory. BellSouth cites the FCC's Report to Congress, CC Docket No., 96-45, April 10, 1998, ¶220. There the FCC stated:

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the [FCC], does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider. [emphasis supplied by BellSouth]

BellSouth claims that this means the FCC believes the distinction is "meaningless in the context of the FCC's pending reciprocal compensation decision." The other parties point out, however, that it is not at all clear what the FCC means in this passage. It appears to us that the FCC is talking here about the status of the provider, not about the severability of the telecommunications service from the information service. Indeed, in the same report, the FCC brought up the severability notion, as discussed above.

BellSouth also argues that the severability theory is contradicted by the FCC's description of Internet service in its Non-Accounting Safeguards Order (Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (released Dec. 24, 1996), note 291), where the FCC states:

> The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol...to enable information exchange. An end user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The

> Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites.

BellSouth claims that the significance of this is that calls to ISPs only transit through the ISP's local point of presence. Thus, the call does not terminate there. In support of this conclusion, BellSouth mentions several other services, such as Asynchronous Transfer Mode (ATM) technology, that use packet switching. BellSouth makes the point that the jurisdictional nature of a call is not changed through the conversion from circuit switching to packet switching.

BellSouth also discussed an example where an end user made a long-distance call to access voice mail. In that case the call was an interstate call, and the FCC found that it did not lose that interstate character upon being forwarded to voice mail. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993). We do not comprehend BellSouth's point. By that logic, if a local call is used to access an information service, it follows that the entire transmission would be local. In yet another case cited by BellSouth, the FCC found that interstate foreign exchange service was interstate service, and thus came under the FCC's jurisdiction. New York Telephone Co.--Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 FCC 2d 349 (1980). Once again, it is difficult to discern BellSouth's point. We do not find this line of argument at all persuasive.

BellSouth further argues that "[t]he FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of facilities used, but by the nature of the traffic that flows over those facilities." This, too, is a perplexing argument in light of BellSouth's claims that the distant location of the host accessed over the Internet makes ISP traffic interstate, and that the nature of ISP traffic as either telecommunications or information service is irrelevant.

As mentioned above, witness Hendrix did admit that "the FCC intended for ISP traffic to be 'treated' as local, regardless of jurisdiction." He emphasized the word treated, and explained that the FCC "did not say that the traffic was local but that the traffic would be treated as local."

FPSC Treatment

BellSouth dismisses Commission Order No. 21815, issued September 5, 1989, in Docket No. 880423-TP, Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, as an interim order. In that order, the Commission found that end user access to information service providers, which include Internet service providers, is by local service. In the proceeding, BellSouth's own witness testified that:

> [C]onnections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. (Order 21815, p. 25)

The Commission agreed with BellSouth's witness. The Commission also found that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida. BellSouth's position, as stated in the Order, was that:

> calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Provider's] location. Connectivity to a point out of state through an ESP should not contaminate the local exchange. (Order, p. 24) (ISPs are a subset of ESPs.)

In this case, Witness Hendrix claimed that Order 21815 was only an interim order that has now been overruled. He could not identify any Commission order establishing a different policy; nor could he specify the FCC order that supposedly overrules the Florida Commission order. Further, and most importantly, BellSouth admitted that this definition had not been changed at the time it entered into its Agreements.

It is clear that the treatment of ISP traffic was an issue long before the parties' Agreement was executed. We found, in Order No. 21815, as discussed above, that such traffic should be treated as local. Both WorldCom and BellSouth clearly were aware of this decision, and we presume that they considered it when they entered into their Agreement.

Intent of Parties

In determining what was the parties' intent when they executed their contract, we may consider circumstances that existed at the time the contract was entered into, and the subsequent actions of the parties. As WorldCom argues in its brief, "the intent of the parties is revealed not just by what is said, but by an analysis of all the facts and circumstances surrounding the disputed issue."

In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953) the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language ... Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred ... An interpretation which is just to both parties will be preferred to one which is unjust.

In the construction of a contract, the circumstances in existence at the time the contract was made should be considered in ascertaining the parties' intention. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhg. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958).

As noted above, Section 1.40 of the Agreement defines local traffic. The definition appears to be carefully drawn. Local traffic is said to be calls between two or more service users bearing NPA-NXX designations within the local calling area of the incumbent LEC. It is explained that local traffic includes traffic traditionally referred to as "local calling" and as "EAS." No mention is made of ISP traffic. Therefore, nothing in Section 1.40 sets ISP traffic apart from local traffic. It is further explained that all other traffic that originates and terminates between end users within the LATA is toll traffic.

As evidence of its intent, BellSouth argues that the interpretation of a contract must be one consistent with reason, probability, and the practical aspect of the transaction between the parties. BellSouth contends that it was "economically

irrational for it to have agreed to subject ISP traffic to payment of reciprocal compensation." BellSouth claims it "had no rational economic reason to have agreed to pay reciprocal compensation for the ISP traffic, because...such assent would have likely guaranteed that BellSouth would lose money on every customer it serves who subscribed to an ISP served by a complainant."

In an example provided by BellSouth, a BellSouth residential customer subscribes to an ISP that is served by an ALEC. The customer uses the Internet for two hours per day. This usage would generate a reciprocal compensation payment to the ALEC of $36.00 per month, assuming a 1 cent per minute reciprocal compensation rate. A Miami BellSouth customer pays $10.65 per month for residential service. Thus, BellSouth would pay $25.35 per month more to the ALEC than it receives from its customer. BellSouth claims that this unreasonable result is proof that it never intended to include ISP traffic as local for reciprocal compensation purposes.

Not all parties receive reciprocal compensation of 1 cent per minute. The MCIm Agreement specifies a rate of $0.002 per minute, not $0.01. In this case, using BellSouth's example, the total reciprocal compensation would be $7.20. MCIm points out in its brief that the contract containing the $0.01 rate is one to which BellSouth agreed. They argue that "[w]hether BellSouth agreed to this rate because they mistakenly thought that a rate five times higher than cost would give it some competitive advantage, or whether BellSouth agreed to it without thinking at all, it is not the Commission's role to protect BellSouth from itself."

In support of its position that ISP traffic was intended to be treated as local in the Agreement, WorldCom points out that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers within the local calling area to connect with the ISP by means of a local call. Such calls are rated and billed as local, not toll.

MCIm also points out that BellSouth treats calls to ISPs that are its customers as local calls. BellSouth also offers its own ISP customers service out of its local exchange tariffs. MCIm asserts that while it treats its own customers one way, BellSouth would have ISP customers of the ALECs treated differently.

Besides BellSouth's treatment of its own ISP customers' traffic, there is nothing in the parties' agreements that addresses the practical aspect of how to measure the traffic. As TCG points out in its brief, BellSouth failed to take any steps to develop a tracking system to separately account for ISP traffic. The TCG contract was entered into in July 1996, but BellSouth did not

attempt to identify ISP traffic until May or June of 1997. If the agreement did in fact exclude ISP traffic from the definition of local traffic, and thus the reciprocal compensation provisions of the agreement, it would be necessary to develop a tracking system. The evidence indicates that the tracking system currently used by BellSouth is based on identifying the seven-digit number associated with an ISP. Absent that, as BellSouth witness Hendrix conceded, BellSouth must rely on estimates.

Intermedia also points out in its brief that:

> If ISP traffic is not local as BellSouth contends, it would have been imperative for the parties to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls. If BellSouth intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all other types of local calls with long holding times, such as calls to airlines and hotel reservations, and banks. In fact, there is no such agreed-upon system in place today.

This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. WorldCom argues in its brief that BellSouth's "lack of action is especially glaring given Mr. Hendrix's acknowledgment that there are transport and termination costs associated with calls terminating at an ISP." Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic. Witness Hendrix admitted, "We may have paid some, I will not sit here and say that we did not pay any." The other parties made no effort to separate out ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period.

It appears from the record that there was little, if any, billing of reciprocal compensation by the ALECs until just before BellSouth began to investigate the matter. It was the receipt of the bills for considerable amounts of reciprocal compensation that triggered BellSouth's investigation of the matter, and its decision to begin removing ISP traffic from its own bills. If these large bills were never received, would BellSouth have continued to bill

the ALECs for reciprocal compensation on ISP traffic? There would have been no reason for BellSouth to investigate, and therefore no reason for them to start separating their own traffic. Under the circumstances, we have difficulty concluding that the parties all knew that ISP traffic was interstate, and should be separated out before billing for reciprocal compensation on local traffic, as BellSouth contends.

Impact on Competition

The potential impact of BellSouth's actions on local competition is perhaps the most egregious aspect of the case. As witness Hendrix testified, The Telecommunications Act of 1996 "established a reciprocal compensation mechanism to encourage local competition." He argued that "The payment of reciprocal compensation for ISP traffic would impede local competition." We are more concerned with the adverse effect that BellSouth's refusal to pay reciprocal compensation could have on competition. We agree with this assessment by TCG witness Kouroupas:

> As competition grows, the smaller, leaner ALECs may well win other market segments from ILECs. If each time this occurs the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs out of whole cloth and thus invoke costly regulatory processes, local competition could be stymied for many years.

Conclusion

We think the question of whether ISP traffic is local or interstate can be argued both ways. While it appears that the FCC may believe Internet usage is an interstate service, it also appears that it believes that it is not a telecommunications service. The FCC itself seems to be leaning toward the notion of severability of the information service portion of an Internet call from the telecommunications portion, which is often a local call. Further, the FCC has allowed ISPs to purchase local service for provision of Internet services, without ever ruling on the extent to which the "local" characterization should apply. Indeed, as recently as April, 1998, the FCC itself indicated that a decision has not been made as to whether or not reciprocal compensation should apply. Thus, while there is some room for interpretation, we believe the current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement. We also believe that the language of the Agreement itself supports this view. We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the the time the Agreement was executed, that the

parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception.

Even if we assume for the sake of discussion that the parties' agreements concerning reciprocal compensation can be said to be ambiguous or susceptible of different meanings, the parties' conduct at the time of, and subsequent to, the execution of the Agreement indicates that they intended to treat ISP traffic as local traffic. None of the parties singled ISP traffic out for special treatment during their negotiations. BellSouth concedes that it rates the traffic of its own ISP customers as local traffic. It would hardly be just for BellSouth to conduct itself in this way while treating WorldCom differently. Moreover, BellSouth made no attempt to separate out ISP traffic from its bills to the ALECs until it decided it did not want to pay reciprocal compensation for ISP traffic to the ALECS. BellSouth's conduct subsequent to the Agreement was for a long time consistent with the interpretation of Section 1.40 urged by WorldCom. A party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of execution when it later becomes enlightened or discovers an unintended consequence.

BellSouth states in its brief that "the Commission must consider the extant FCC orders, case law, and trade usage at the time the parties negotiated and executed the Agreements." We have. By its own standards, BellSouth is found wanting. The preponderance of the evidence shows that BellSouth is required to pay WorldCom reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to WorldCom for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the WorldCom and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate WorldCom according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The Teleport/TCG South Florida-BellSouth Agreement

Local traffic is defined in Section 1.D. of the Agreement between BellSouth and TCG as:

> any telephone call that originates and terminates in the same LATA and is billed by

> the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which TCG is not directly interconnected.

This Agreement was entered into by the parties on July 15, 1996, and was subsequently approved by the Commission in Docket No. 960862-TP. Under TCG's prior Agreement with BellSouth, ISP traffic was treated as local.

The TCG Agreement states in Section IV.B and part of I.C:

> The delivery of local traffic between parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.
>
> Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, incorporated herein by this reference.

No exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to TCP for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The MCI-BellSouth Agreement

The Agreement between MCI and BellSouth defines local traffic in Attachment IV, Subsection 2.2.1. That subsection reads as follows:

> The parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the FPSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

MCI witness Martinez testified that no exception to the definition of local traffic was suggested by BellSouth. MCI argues in its brief that "[i]f BellSouth wanted a particular exception to the general definition of local traffic, it had an obligation to raise it."

The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay MCI reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to MCI for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the MCI and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate MCI according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The Intermedia-BellSouth Agreement

The Agreement with Intermedia defines Local Traffic in Section 1(D) as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (TR 142-143)

The portion regarding reciprocal compensation, Section IV(A) states:

> The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. (TR 143)

Section IV(B) states:

> Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.

The evidence shows that no exceptions were made to the definition of local traffic to exclude ISP traffic in the Intermedia-BellSouth Agreement. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay Intermedia reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Intermedia for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Intermedia and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate Intermdia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that under the terms of the parties' Interconnection Agreements, BellSouth Telecommunications, Inc. is required to pay Worldcom Technologies, Inc., Teleport Communications Group Inc./TCG South Florida, Intermedia Communications, Inc., and MCI Metro Access Transmission Services, Inc., reciprocal compensation for the transport and termination of telephone exchange service that is terminated with end users that are Internet Service Providers or Enhanced Service Providers. BellSouth Telecommunications, Inc. must compensate the complainants according to the interconnection agreements, including interest, for the entire period the balance owed is outstanding. It is further

ORDERED that these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 15th Day of September, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT 4

Illinois Bell Tel. Co. v. WorldCom Techs., Inc., etc., et al.
No. 98 C 1925 (Jul. 21, 1998)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,	)	
Plaintiff,	)	No. 98 C 1925
v.	)	JUDGE DAVID H. COAR
WORLDCOM TECHNOLOGIES, INC. as a successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP INC., MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION	)	
and	)	
DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (In Their Official Capacities and not as Individuals),	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Illinois Bell Telephone Co. d/b/a/ Ameritech Illinois ("Ameritech") has filed the instant suit challenging the Illinois Commerce Commission's ("ICC" or "the Commission")

determination that Internet calls are "local traffic" as defined by Interconnection Agreements between Ameritech and several of the defendants, and therefore subject to reciprocal compensation. Ameritech contends that the ICC's decision violates the Telecommunications Act of 1996. A hearing on the merits of the case was held by this court on June 25, 1998. As set forth in this Memorandum Opinion and Order, this court upholds the ICC's decision.

I. PROCEDURAL HISTORY

In 1996, plaintiff Ameritech entered into negotiations for separate Interconnection Agreements with five of the defendants in this case, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. ("MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), and Focal Communications Corporation ("Focal") (collectively the "Carrier-defendants"). (Compl. ¶ 16.) In 1996 and 1997 each of the Agreements was approved by the Illinois Commerce Commission ("ICC" or "the Commission"). On September 8, 1997, one of the Carrier defendants, TCG, filed a complaint against Ameritech alleging that Ameritech had violated the terms of its Interconnection Agreement by refusing to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network. (Order at 2.) On October 9 and 10, 1997, WorldCom and MCI filed similar complaints against Ameritech, and the three cases were consolidated on November 4, 1997. (Order at 2.) Subsequently, petitions to intervene were granted as to Focal, AT&T, and others. (Order at 2.)

On March 11, 1998, the ICC entered an Order incorporating factual findings regarding the Carrier defendants' complaints and concluding that Ameritech had violated its Interconnection

Agreements. On March 27, 1998, Ameritech filed the instant suit against the Carrier defendants and the Commissioner of the Illinois Commerce Commission ("the Commissioners") seeking review in federal court of the ICC's March 11 Order pursuant to Section 252(e)(6) of the Telecommunications Act of 1996 and 28 U.S.C. § 1331. Ameritech's five-count complaint alleges that the ICC's order is contrary to governing federal law.[1] As relief, Ameritech requests this court to declare that the term "local traffic" as used in the Agreements does not include Internet ISP calls, declare that the ISP calls are not subject to the payment of reciprocal compensation, and issue an injunction against the enforcement of the ICC's order.

Ameritech also filed a motion for stay of the ICC's order pending review. On May 1, 1998, this court issued a stay of the Order pending expedited review of the case on the merits. The defendant Commissioners have filed two motions to dismiss the plaintiff's complaint. Due to the expedited nature of this proceeding, the Commissioners' motions are not yet fully briefed, and will therefore be reviewed in a subsequent decision of this court. At this court's suggestion, the instant Opinion and Order are without prejudice to the Commissioners' positions raised in the motions to dismiss.

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[1] Count I alleges that the Commission's interpretation of the Agreements is erroneous as a matter of law because, pursuant to the Agreement, the Internet ISP calls are switched exchange access service. (Compl. ¶¶ 40-45.) Count II alleges that the ICC order is contrary to controlling FCC orders which hold that Internet ISP calls are exchange access traffic. (Compl. ¶¶ 46-51.) Count III alleges that the ICC's order violates controlling federal law which assigns authority over interstate communications to the FCC. (Compl. ¶¶ 52-56.) Count IV alleges that the ICC order violates sections 251(b)(5), 252(d)(2), and 251(g) of the 1996 Act. (Compl. ¶¶ 57-62.) Finally, Count V alleges that the ICC order must be set aside under Illinois law. (Compl. ¶¶ 63-4.) Not all of the counts alleged in the complaint were presented to this court in the final briefing on the merits.

II. BACKGROUND

A. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or "Telecommunications Act"), is intended to foster competition in local telephone service. The Act, which amends the Communications Act of 1934, works to open "all telecommunications markets through a pro-competitive, deregulatory national policy framework." In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 2 (Dec. 24, 1996) (hereinafter "Third Report and Order"). See generally MCI Telecommunications Corp. v. Bellsouth Telecommunications, Nos. 97 C 2225, 97 C 4096, 97 C 0886, 97 C 8285, 1998 WL 146678, at *1-2 (N.D. Ill. March 31, 1998); GTE South, Inc. v. Morrison, Jr., 957 F. Supp. 800, 801-02 (E.D. Va. 1997). The Act preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251(c)(2)(D) (1998).

Under Sections 251 and 252 of the Act, incumbent Local Exchange Carriers ("LECs") and telecommunication carriers have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated by the Act. See id. §§ 251(c), 252. Section 252 provides that parties may enter into agreements either voluntarily or through arbitration with a state public utility commission. If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission for arbitration. See id. § 252(b)(1). A final interconnection agreement, whether

negotiated or arbitrated, is reviewed by the state commission in order to determine whether it complies with the Act. See id. § 252(e)(1).

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 250, of this title and this section." Id. § 252(e)(6). Courts have found that review by the federal courts under Section 252(e)(6) of the Act extends to "the various decisions made by [state commissions] throughout the arbitration period which later became part of the agreement . . ." GTE South, 957 F. Supp. at 804.

B. STANDARD OF REVIEW

The Telecommunications Act does not explicitly state the standard that federal district courts should apply when reviewing the decision of a state commission. The Supreme Court has held that in situations "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715, 83 S. Ct. 1409, 1413 (1963) (citations omitted). Accordingly, review in the instant case is limited to the administrative record. See, e.g., U.S. West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Slip Op. at 3 (W.D. Wash. Jan. 7, 1998).

Courts that have examined the standard to be applied in appeals from state commissions have found that the language of Section 252(e)(6) clearly limits a court's jurisdiction to determining whether the agreement meets the requirements of federal law, in particular, the Telecommunications

Act. See, e.g., Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. 98 CA 043, Slip Op. at 9 (W.D. Tex. June 16, 1998) (citing GTE Northwest, Inc. v. Hamilton, 971 F. Supp. 1350, 1354 (D. Or. 1997)). District courts reviewing decisions of state commissions agree that the commissions' interpretations of federal law are reviewed de novo, while all other issues, including factual findings, are reviewed with substantial deference. See, e.g., Southwestern Bell, No. 98 CA 043 at 10-11; U.S. West Communications, Inc. v. MFS Intelinet, Inc., No. C 97-222WD (W.D. Wash. Jan. 7, 1998); GTE South, 957 F. Supp. at 804; U.S. West Communications, Inc., v. Hix, 986 F. Supp. 13, 17 (D. Colo. 1997); AT&T Communications of California, Inc. v. Pacific Bell, No. C 97-0080, 1998 WL 246652, at *3 (N.D. Cal. May 11, 1998). Courts have reasoned that such a standard furthers the goals of the Telecommunications Act because state commissions have "little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency." Hix, 986 F. Supp. at 17.

This court agrees with the reasoning of the above-cited district courts regarding the standard of review for actions brought under the Telecommunications Act. In this two-tiered system of review, the court must first address whether the state commission's action in reviewing the interconnection agreements was procedurally and substantively in compliance with the Act and its regulations. See Southwestern Bell, No. 98 CA 043 at 10. If the court finds that the decision is consistent with federal law, the court must next determine whether the decision was arbitrary, capricious, or not supported by substantial evidence. Id. at 10-11. "Generally, an agency decision will be considered arbitrary and capricious if the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

that it could not be ascribed to a difference in view or the product of agency expertise." Hix, 986 F. Supp. at 18 (citing Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997)).

III. ANALYSIS

The case at bar is an issue of first impression for this court. Although one other district court, Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. 98 CA 043, Slip Op. at 14-25 (W.D. Tex. June 16, 1998) (holding that calls to an ISP are "local traffic" and therefore eligible for reciprocal compensation),[2] and state commissions in 19 states, (Carrier Def.'s Ex. 6), have determined that LECs must provide reciprocal compensation for calls to the Internet, no federal court in the Seventh Circuit has yet to answer this question.

This case involves the arcane regulatory and contractual question of the appropriate compensation for LECs that terminate Internet traffic. Ameritech argues that such calls are properly classified as "interstate"[3] exchange access calls and therefore no reciprocal compensation should apply. The Carrier defendants and the Commissioners argue that such calls are "local" and therefore require reciprocal compensation under the terms of the Interconnection Agreements. Some review of relevant terminology and technology is useful for understanding the issue at bar, in particular, the

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[2] Another federal district court found, in reviewing an agreement approved by the Washington Utilities and Transportation Commission, that the state commission had not acted arbitrarily or capriciously in "deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fee." U.S. West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Slip Op. at 8 (W.D. Wash. Jan. 6, 1998) ("ESPs" refers to "Enhanced Service Providers," which include Internet Service Providers.).

[3] The Federal Communications Commission has determined that interstate telecommunications occur "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45, ¶ 112 (April 10, 1998).

billing procedures for local and long distance calls, as well as the growing phenomenon of the Internet and Internet Service Providers.

A. RECIPROCAL COMPENSATION

Section 251(b)(5) of the Telecommunications Act provides that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The corresponding regulations define "reciprocal" compensation as an "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e) (1998). The reciprocal compensation system functions in the following manner: a local caller pays charges to her LEC which originates the call. In turn, the originating carrier must compensate the terminating LEC for completing the call. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dockets 96-98 et al., First Report and Order, 11 F.C.C. Rcd. 15499, ¶ 1034 (Aug. 8, 1996) (hereinafter "First Report and Order").

Reciprocal compensation applies only to local telecommunications traffic." 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that "originates and terminates within a local service area established by the state commission." Id. § 51.701 (b)(1). Ameritech argues that Internet calls are not properly classified as "local" calls under the Interconnection Agreements at issue. Therefore, according to Ameritech, payment of reciprocal compensation is improper.

B. ACCESS CHARGES

"Access charges" are the fees that long distance carriers, known as interexchange carriers ("IXCs"), pay to LECs for connecting the end user to the long distance carrier. "Access charges were developed to address a situation in which three carriers – typically, the originating LEC, the IXC, and the terminating LEC – collaborate to complete a long-distance call." First Report and Order ¶ 1034. Typically, the long-distance carrier will pay both the terminating and originating LEC an access charge. The service provided by the LECs is known as "exchange access." The 1996 Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16) (1998).[4]

C. THE INTERNET

"The Internet is an international network of interconnected computers. . . . [which] enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." Reno v. American Civil Liberties Union, --- U.S. —, —, 117 S. Ct. 2329, 2334 (1997) (footnote and internal citation omitted). The Internet functions by splitting up information into small chunks or "packets" that "are individually routed through the most efficient path to their destination . . ." In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45 (April 10, 1998) at ¶ 64 (hereinafter "Universal Service

[4] "Telephone toll service" is defined by the act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153 (48) (1998).

Report"). Despite the growing importance of the Internet in worldwide communications, "[t]he major components of the [Telecommunications Act] have nothing to do with the Internet." Reno, --- U.S. at ---, 117 S. Ct. at 2338.

D. INTERNET SERVICE PROVIDERS

An Internet Service Provider ("ISP") is an entity that provides its customers the ability to obtain on-line information through the Internet by communicating with web sites. ISPs function by combining "computer processing information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." Universal Service Report ¶ 63. If an ISP is in a local calling area, the ISP customer dials a seven-digit number to access the ISP facility and is generally charged a flat fee for the ISP usage, in addition to the corresponding local fee rate for the call to the ISP.[5] Among the services offered to many subscribers to the Internet are electronic mail, file transfers, Internet Relay Chat, and the ability to browse and publish on the World Wide Web. See, e.g., American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), aff'd, Reno v. American Civil Liberties Union, --- U.S. ---, 117 S. Ct. 2329 (1997).

ISPs have been exempted from paying "access charges" to LECs for connecting them to the end user. Third Report and Order ¶ 288. In 1983, the FCC classified ISPs as "end users" rather than

[5] Typically, when an individual calls the Internet the call is routed to a "dial-in site," "a small physical location (a phone closet for instance) that contains the electronic equipment needed to accept modem calls and connect them to" the Internet. Haran Craig Rashes, The Impact of the Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers, 16 Temp. Envtl. L. & Tech. J. 49, 69 (1997) (internal citations and footnote omitted.) "Each Internet Service Provider may place anywhere from one or two to thousands of incoming lines and modems in the same location. An Internet Service Providers' equipment at local dial-in sites consists of banks or pools of modems configured in multi-line hunt groups, with one lead number serving as a central number to receive calls." Id.

as "carriers" for purposes of the access charge rules. Id. As a result of this decision, ISPs purchase services from LECs "under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates." Id. ¶ 285. In a 1996 Order reviewing the 1983 "exemption" decision, the FCC "tentatively conclude[d] that the current pricing structure should not be changed so long as the existing access charge system remains in place." Id. ¶ 288.

E. TELECOMMUNICATIONS VS. INFORMATION SERVICES

The FCC has repeatedly made it clear that "telecommunications" and "information services" are "mutually exclusive" categories. Universal Service Report ¶ 59. See also id. ¶ 57 ("[W]e find strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services.") According to the FCC, such an interpretation is "the most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service." Id. ¶59. The distinction drawn by the FCC mirrors the definitions of "telecommunications" and "information services" in the Act. "Information service" is defined by the Telecommunications Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (1998). "Telecommunications," however, is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43).

Following the definitions in the Act, the FCC has found that the key distinction between telecommunications and information services rests on the functional nature of the end user offering. Universal Service Report ¶¶ 59, 86. "[I]f the user can receive nothing more than pure transmission, the service is telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." Id. ¶ 59.

Applying these definitions, the FCC has determined that Internet services are "information services" and not "telecommunications." See, e.g., Universal Service Report ¶ 66 ("Internet service providers themselves provide information services, not telecommunications . ."); Id. ¶ 80 ("The provision of Internet access service . . . is appropriately classed as an 'information service.'"); Id. ¶ 81 ("Internet access provider[s] . . . are appropriately classified as information service providers.").

There may be some rare instances, however, when the services provided by the Internet are actually telecommunications. For example, the FCC indicated in its recent report that "phone-to-phone telephony"[6] lacks the characteristics of information services, and could actually be classified as telecommunications services. Id. ¶ 89. However, the FCC reserved making any final ruling on the subject until a more complete record is established. See id. ¶ 90. See generally Robert M.

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[6] In phone-to-phone telephony, "the customer places a call over the public switched telephone network to a gateway, which returns a second dial tone, and the signaling information necessary to complete the call is conveyed to the gateway using standard in-band (i.e., DMTF) signals on an overdial basis. The customer's voice or fax signal is sent to the gateway in unprocessed form (that is, not compressed and packetized). The service provider compresses and packetizes the signal at the gateway, transmits it via IP to a gateway in a different local exchange, reverses the processing at the terminating gateway and sends the signal out over the public switched telephone network in analog, or uncompressed digital, unpacketized form." Universal Service Report ¶ 84, n. 177.

Frieden, Dialing for Dollars: Should the FCC Regulate Internet Telephony?, 23 Rutgers Computers & Tech. L. J. 47 (1997) (discussing the various policy issues that may arise from the development of Internet telephony).

F. THE INTERCONNECTION AGREEMENTS

At the heart of this dispute are the Interconnection Agreements which were entered into between Ameritech and the various Carrier defendants. All of the Agreements provide that "local traffic" which terminates on the "other Party's network" is eligible for reciprocal compensation. Specifically, the Agreements state that:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Defendant's] network for termination on the other Party's network.

(MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1.) The Agreements define "local traffic" as "local service area calls as defined by the Commission," (TCG § 1.43), or as:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V & H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis in original). The Agreements further provide that "switched exchange access service" is not eligible for reciprocal compensation. (MFS § 5.8.3; TCG § 5.6.2; MCI § 4.7.2; AT&T § 4.7.2; Focal § 5.8.2). Switched exchange access service" is defined in the Agreements as "the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service," which includes "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and

900 access and their successors or similar Switched Exchange Access services." (MFS § 1.56; TCG § 1.65; MCI sch. 1.2; AT&T sch. 1.2; Focal § 1.66.)

The parties do not contend that the Agreements specifically classify the Internet as either local traffic or exchange access service. Indeed, this court could not find an express reference to the Internet in the various Interconnection Agreements.

G. THE COMMISSION'S DECISION

The Commission's Order concludes that Ameritech Illinois must pay reciprocal compensation to the Carrier defendants with respect to calls placed by Ameritech Illinois customers through the Internet via ISPs who are customers of the Carrier defendants.[7] In its decision, the Commission first reviewed the procedural history of the case and the positions of the parties. (Order

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[7] The Order states in the pertinent part:

> IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 14 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.
>
> IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extend Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.

(Order at 16.)

at 1-10.) The Commission then presents a four-page analysis of the relevant facts and law for reaching its decision that reciprocal compensation applies to Internet calls.

The Commission's first reason for its decision is based on the language of the Agreements themselves. The Interconnection Agreements state that reciprocal compensation applies "for transport and termination of Local Traffic *billable* by Ameritech [or the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's [or the Carrier Defendant's] network for termination on the other Party's line." (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) (emphasis added). According to the Commission, the "billable" language in the Agreements "unambiguously provide[s] that reciprocal compensation is applicable to local traffic billable by Ameritech." (Order at 11.) Reasoning that Ameritech charges end users local service charges when completing calls that terminate at a competitor's ISP customer, the Commission concluded that "the plain reading" of the billable language necessitates reciprocal compensation charges for ISP calls. (Order at 11.)

The second rationale employed by the Commission is again dependent on the language of the Agreements. Specifically, the Agreements provide that reciprocal compensation applies for calls *terminated* on the other party's line. (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) The Commission found that a call to an ISP *terminates* at the ISP before it is connected to the Internet. (Order at 11.) The Commission was persuaded by the Carrier defendants' definition of industry practice, in which call termination "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (Order at 11, citing WorldCom Ex. 1.0 at 7.) According to the Commission, "termination" in the context of the Agreements does not mean that the call ends.

(Order at 11.) The Commission's view of termination of the call leads to the conclusion that such calls are correctly classified as local calls under the Agreements.

In the final part of the Commission's analysis, it rejected the argument made by Ameritech that a call's distance must be determined on an "end-to-end" basis, that is, from the end user to the web site. Such a reading would be an "outdated conception of the telecommunications network" and would be inconsistent with the Act and "the FCC's own decisions." (Order at 11-12.) In a rather confusing explanation of this point, the Commission states that Internet calls are unlike Feature Group A ("FGA") calls, which are classified in the Agreements as "switched access service." FGA calls are long distance calls that end users initiate by dialing a local seven-digit number. When the user dials the local number, she is connected to the interexchange carrier's toll switch which gives the user a second dial tone, at which point the user dials a long distance number. Although Ameritech argued that FGA calls are functionally identical to Internet ISP calls, the Commission found that such calls are distinguishable because FGA calls undeniably involve telecommunications traffic with the end user to which the call is terminated. In contrast, Internet calls involve what the FCC has found to be "information services" after the call is terminated to the ISP. "Based on these critical distinctions [between telecommunication traffic and information service] the FCC has determined that ISP traffic is not an exchange access service, but rather, ISPs should be treated as 'end users.'" (Order at 12.) (emphasis in the original).

H. FCC RULINGS

This court's role in reviewing the ICC's decision requires that it examine the court's interpretation of federal law de novo. See discussion, supra, Part II.B. Examining the FCC's interpretation of the relevant issue is therefore necessary because if this court finds that the FCC has

a reasonable and consistently held interpretation of the applicable law, those rulings would be entitled to substantial deference. Cf. Arkansas v. Oklahoma, 503 U.S. 91, 110, 112 S. Ct. 1046, 1059 (1992); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). See also Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) ("An agency's construction of its own regulation binds a court in all but extraordinary cases."); United States v. Baxter Healthcare Corp., 901 F.2d 1401, 1407 (7th Cir. 1990) (finding that a court must give great deference to agency's interpretations of its own regulations).

After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a relatively new development to the telecommunications world, presents unique questions that have not previously been addressed by FCC decisions and policy. For example, the FCC recently initiated a Notice of Inquiry seeking comments on the effect of the Internet and other information services on the telephone network, noting that the Internet creates perplexing policy issues:

> [T]he development of the Internet and other information services raise many critical questions that go beyond the interstate access charge system that is the subject of this proceeding. Ultimately, these questions concern no less than the future of the public switched telephone network in a world of digitalization and growing importance of data technologies. Our existing rules have been designed for traditional circuit-switched voice networks, and thus may hinder the development of emerging packet-switched data networks. To avoid this result, we must identify what FCC policies would best facilitate the development of the high-bandwidth data networks of the future, while preserving efficient incentives for investment and innovation in the underlying voice network. In particular, better empirical data are needed before we can make informed judgments in this area.

Third Report and Order ¶ 311.

This court's determination that no clear rule on the issue exists is confirmed by the fact that on June 20, 1997, the FCC expedited consideration of a request for clarification of its rules from the Association for Local Telecommunications. The issue under review is identical to the issue at bar: whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for transport and termination of traffic to LECs that are information service providers. See Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Public Notice, FCC Common Carrier Bureau/CPD 97-30,12 F.C.C. Rcd. 9715 (July 2, 1997). Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Order and Opinion, the issue has not been resolved. See also Memorandum of the Federal Communications Commission as Amicus Curiae, Mem. at 2, June 29, 1998, filed in Southwestern Bell, No. 98 CA 043 (stating that the issue of the rights of LECs to receive reciprocal compensation is "pending before the FCC in an administrative proceeding and remains unresolved). Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.

The Carrier defendants and the Commissioners argue that reciprocal compensation applies only to telecommunications, and, therefore, the fact that ISPs generally do not provide telecommunications necessitates a finding that reciprocal compensation must be paid to the terminating LEC. Ameritech responds, however, that such argument is a red herring. Ameritech relies heavily on the FCC's statement in its 1998 Universal Service Report that the issue of reciprocal compensation does not "turn on" on the telecommunications/information service distinction:

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.

¶ 106, n. 220. Although the statement of the FCC in Footnote 220 is ambiguous as it relates to the issues involved here, this court agrees with Ameritech to the extent that any rationale regarding whether reciprocal compensation must be paid for such calls cannot hinge entirely on the information service/telecommunications distinction. This does not mean, however, that the distinction does not exist[8] (see discussion, supra, Part III.E) or that an understanding of the distinction is wholly irrelevant to a discussion of the issue at bar.

Despite the fact that Ameritech shuns the information service/telecommunications distinction, it nonetheless argues that language in the FCC's reports indicating that Internet information services are provided via telecommunications is relevant to their argument. See Universal Service ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.'"); Id. ¶ 3 (stating that the Internet "stimulates our country's use of telecommunications"; ISPs are "major users of telecommunications."); Id. ¶15 ("[W]e clarify that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications.'"). Nonetheless, for the same reasons stated against the defendants' use of the distinction, this court finds that the fact that ISPs use telecommunications is not the determining factor in the instant case.

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[8] For example, at oral argument, counsel for the plaintiff clearly stated that it is "undisputed" that ISPs provide information services and are not providers of telecommunications. (Tr. at 31.)

Ameritech's reliance on language in the Universal Service Report indicating that the telecommunications backbone to the Internet is "interstate telecommunications" is more persuasive authority for of the plaintiff's view. See, e.g., Universal Service Report ¶ 55 ("We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide interstate 'telecommunications.' Internet service providers themselves generally do not provide telecommunications.") (emphasis added); Id. ¶ 67 ("The provision of leased lines to Internet service providers, however, constitutes the provision of interstate telecommunications. Telecommunications carriers offering leased lines to Internet service providers must include the revenues derived from those lines in their universal contribution base.") (emphasis added).

Although the characterization of leasing lines to local ISPs as providing "interstate telecommunications" causes this court to pause, ultimately this court is not convinced that such language compels a finding under federal law that a call from an end user to an ISP is an interstate call and that termination for billing purposes does not occur at the ISP. This court is especially skeptical of the above cited language from the Universal Service Report because of the context in which the term "interstate" is discussed. A great deal of the Universal Service Report discusses the future of the FCC's goal of providing "universal service," that is, services to all customers throughout the country, "including low-income customers and those in rural, insular, and high cost areas . . . at rates that are reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3) (1998). Under the Telecommunications Act, carriers "that provide interstate telecommunications services must contribute to federal universal service mechanisms." Universal Service Report ¶ 55. A concern arises with the development of the Internet because, as information service providers, ISPs do not contribute directly to the development of universal service. Id.

Given this background, this court is not convinced that the use of the term "interstate" in the context of discussing the Internet means that the FCC has made a determination that calls to the Internet are "interstate" for billing purposes. Nor is this court persuaded that such statements would require the overturning of a state commission's finding that such calls terminate locally at the ISP. Instead, the FCC has only provided that those who lease lines to ISPs provide interstate telecommunications and therefore ISPs are contributing, albeit indirectly, to the goal of universal service. Id. In essence, by leasing their lines from telecommunications carriers that do contribute to the universal system, the ISPs are contributing to the continuation of the goal of universal coverage. See id. ¶68 ("Internet access, like all information services, is provided 'via telecommunications.' To the extent that the telecommunications inputs underlying Internet services are subject to the universal service contribution mechanism, that provides an answer to the concern . . . [that] there will no longer be enough money to support the infrastructure needed to make universal access to voice or Internet communications possible.") (footnote and internal quotations omitted).

The FCC has made statements acknowledging that calls to the Internet using a seven-digit number are "local." See, e.g., In re Access Charge Reform, First Report and Order, 12 F.C.C. Rcd. 15982, ¶ 342, n. 502 ("To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.") (emphasis added). The FCC has also indicated that rate structures for such calls are appropriately addressed by state, rather than federal, regulators. See id. ¶ 345–46 ("ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and

subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.") (emphasis added).[9]

Ameritech further argues, relying on decisions involving the creation of the access charge regime (see discussion, supra, Part III.B, III.D), that the FCC has ruled that Internet Calls are exchange access calls. For example, in 1983 the FCC stated that:

> Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . .Were we at the outset out impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.

MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (1983). Although the FCC has continued to uphold its ruling that ISPs are exempt from any access charges (see, e.g., Universal Service Report ¶ 146), the FCC has clarified its position in more recent rulings. In particular, the FCC has stated that due to "the evolution in ISP technologies and markets since we first established access charges

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[9] Ameritech states that most calls to ISPs are subject to flat (low) rate calls, and Internet calls tend to be longer than other types of calls. Under the current rate structure, Ameritech contends, if reciprocal charges are applicable to such charges Ameritech must pay more to the terminating LEC than it can bill its customers. Implicit in Ameritech's argument is the assertion that the reciprocal payments thus incurred far exceed the cost to the LEC for terminating the call. If that is true, it is unclear how the state regulators can adequately restore equity to the process except through some bifurcation which would assign a different reciprocal rate to ISP traffic. Merely raising the rates that the originating LEC charges its local customers would simply finance a windfall for the terminating LEC out of the pocketbooks of customers.

in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established." In the Matter of Access Charge Reform, First Report and Order, CC Docket Nos. 96-262 et al., FCC 97-158, ¶ 345 (May 16, 1997). Indeed, instead of classifying ISPs as IXCs, the FCC has maintained that ISPs are, and should remain, classified as end users. Id. ¶ 348. Furthermore, the FCC has concluded, at least "tentatively," that the current structure of charging ISPs as end users should "not be changed so long as the existing access charge system remains in place." Third Report and Order ¶ 288.

In conclusion, this court finds that at the time that the Agreements were entered into there was no clear FCC position on whether or not calls to Internet ISPs are interstate exchange access calls. The FCC is currently reviewing the very question at issue in this case. Accordingly, the answer to the question of the interpretation of the Agreements lies principally in contract interpretation. These are questions that this court must review with substantial deference to the ICC's findings.

I. FINAL ANALYSIS OF ICC DECISION

The ICC's decision states three reasons for rejecting Ameritech's argument. This court finds that the third reason, which is based principally on the information services/telecommunications distinction, is not relevant to the case at bar. (See discussion, supra, Part III.H.) However, as the third reason does not include incorrect statements of federal law and this court finds that the remaining two reasons stated in the Commission's opinion are sufficient to uphold the decision, Ameritech's request that the decision be set aside is rejected.

The third section of the ICC's analysis is less clear than the other two arguments. Indeed, the third argument is jumbled and difficult to decipher. Without clearly linking its reasoning to its decision to uphold reciprocal compensation for Internet calls, the ICC states in one stream of reasoning (encompassing only one page of text) that: (1) end-to-end jurisdiction is "outdated"; (2) FGA calls are distinguishable from Internet calls; (3) the Internet provides "information services" and not "telecommunications"; and, (4) ISPs are not exchange access service, but rather "end users." (Order at 11-12.) In fact, this section of the Commission's opinion reads more like a selective review of FCC precedent than solid reasoning for supporting reciprocal compensation for Internet calls.

For the reasons already discussed, this court finds that these statements of the Commission, though overstated, are not expressly violative of existing federal law. However, to the extent that this portion of the Commission's decision relies heavily on the distinction between information service and telecommunications, this court rejects that analysis. The FCC has warned that this distinction, although it does exist, is not the answer to whether the LEC is entitled to reciprocal compensation for terminating Internet traffic. See Universal Service Report ¶ 106, n. 220. Nonetheless, the Commission's analysis does not "turn on" this distinction. Furthermore, as the decision stands on its own based on the first two rationales, this court does not find that the Commission's discussion of the information service/telecommunications distinction provides a basis for reversal.[10]

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[10] Ameritech also criticizes the ICC's use of the distinction with Feature Group A calls ("FGA"), which is mentioned in the ICC's highlighting of the information service/telecommunications distinction in the third portion of its analysis. Ameritech stresses the point that FGA calls are "functionally and technically" indistinguishable from an Internet call.

Close analysis of the remaining two rationales reveals that such reasoning is consistent with federal law and is supported by substantial evidence. These two arguments are: (1) the Agreements use of the word "billable" requires reciprocal compensation for Internet traffic because Ameritech bills such calls as local; and, (2) the industry use of the word "terminates" requires a finding that the call to the ISP terminates at the ISP.

First, the "billable" rationale is a reasonable interpretation of the contracts. Ameritech argues that such a reading is wrong as a matter of law, contending that the Agreements define local traffic based not on billing treatment, but on points of origin and termination of the traffic. (Ameritech Resp. at 14.) Ameritech further informs that the billing practice for Internet calls is identical to the billing treatment of FGA calls, and therefore the Commission's holding would make FGA calls "local." Ameritech does not cite any cases to support this proposition. Furthermore, Ameritech ignores the fact that the Agreements specifically exclude FGA calls from the reciprocal compensation provision. No such explicit provision is found in the Agreements regarding Internet calls. In fact, the Internet and ISPs are not even mentioned in the Agreements. No doubt the next time Interconnection Agreements are negotiated between the parties such a provision regarding the termination of Internet calls will be the subject of vigorous discussion. However, this court will not impose such a provision into the Agreements as written.

(Ameritech Merits Brief at 10.) However, Ameritech does not cite a single statute or ruling in support of this view. Although it may be appealing to analogize the two types of calls as functionally similar, this court will not be swayed by such argument. As previously discussed, a special provision in the Interconnection Agreements explicitly excludes FGA calls from paying reciprocal compensation. No such exception is provided for Internet calls.

Although reasonable persons may differ on the interpretation of the language of the Agreements, a finding that calls that are billed as local must receive reciprocal compensation is not violative of current federal law. Furthermore, such a finding is a reasonable interpretation of the contracts and is neither arbitrary nor capricious. It is undeniable that Ameritech has consistently billed it customers for their calls to ISPs as local calls. This court therefore concurs with the ICC's conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation.

Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a "jurisdictional" standard for termination that would be measured on an "end-to-end" basis is not convincing. Although Ameritech is correct that "end-to-end" language is used in some earlier FCC decisions in different contexts,[11] the FCC has not issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one "end." Furthermore, all of the cases cited by the plaintiff in support of its end-to-end argument are from the pre-1996 Act era. (See Ameritech Mem. at 17-18.)

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[11] See, e.g., Southwester Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68, Order Designating Issues for Investigation, 3 F.C.C. Rcd. 2339, ¶ 28 (1988) (rejecting the view that two calls are created by the use of a 1-800 number for a credit card call and stating that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."); Petition for Emergency Relief and Declaratory Ruling Filed by the Bellsouth Corporation, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (finding that a call to an out-of-state voice mail service is a single interstate communication); Long-Distance/USA, Inc., 10 F.C.C. Rcd. 1634, ¶ 13 (1995) (finding that 1-800 calls are a single communication; "both court and Commission decisions have considered the end-to-end nature of the communication more significant than the facilities used to complete such communications).

Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. See, e.g., Third Report and Order ¶ 288. Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding call termination. Indeed, the Internet Agreements themselves authorize the Commission to determine when a call qualifies as "local."[12]

The ICC's decision included the following finding of fact regarding call termination:

> [W]e are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned . . ."

(Order at 11.) This definition of "termination"[13] is crucial to understanding the meaning of the Agreements, as the Agreements specifically use the word termination in defining reciprocal compensation. When a customer of a LEC dials the ISP's local, seven-digit number, the customer

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[12] TCG's Agreement provides that "local traffic" is "local service area calls as defined by the Commission." (TCG § 1.43.) The Agreements of the other Carrier defendants provide that a "local call" is:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V & H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis added).

[13] The ICC's definition of "termination" closely follows that adopted by the ICC. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, ¶ 1040 (Aug. 8, 1996) ("We define 'termination,' for purposes of section 251(b)(5) [the reciprocal compensation provision of the Telecommunications Act], as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.").

is connected to the ISP. Once this "call connection" is established between the caller and the telephone exchange service of the seven-digit number, the call is deemed "terminated" for purposes of the Agreements. The fact that the ISP then connects the user to the Internet, where the user may access unlimited web sites, does not alter the fact that the call has been "terminated" at the ISP for purposes of reciprocal compensation.

J. THE ICC ORDER VIOLATES SECTION 251(G) OF THE ACT

Ameritech's final argument is that the ICC's order violates Section 251(g) of the Telecommunications Act. Pursuant to Section 251(g),

> On or after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

According to Ameritech, because no court order, consent decree, regulation, order, or policy of the FCC provided for the payment of reciprocal compensation prior to February 7, 1996, reciprocal compensation cannot now apply. Ameritech states that reciprocal compensation could only apply if the FCC were to explicitly so require by regulation. Such an argument is circular, and escapes the logic of this opinion. Section 251(g) merely provides that local exchange carriers must provide services with the same "equal access and nondiscriminatory interconnection restrictions and obligations" as prior to the passage of the Telecommunications Act, until such restrictions or

obligations are superseded. As this court has found that the FCC has no prior ruling that controls in the instant case, there is no ruling that could possibly be violated by ordering continued payments of reciprocal compensation by the plaintiff. Furthermore, as the defendants point out, Ameritech did indeed pay reciprocal compensation for local calls prior to the passage of the Act.

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, this court affirms the Commission's determination that Local Exchange Carriers are entitled to reciprocal compensation under the Interconnection Agreements for Internet calls. The stay of the Commission's order is continued for an additional thirty-five (35) days to allow the parties to appeal.

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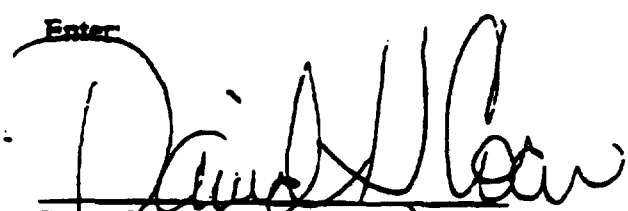

David H. Coar,
United States District Judge

Dated: July 21, 1998

CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that on September 18, 1998 a copy of the foregoing "OPPOSITION TO DIRECT CASES OF FOCAL COMMUNICATIONS, INC." was sent by First Class United States Mail, postage prepaid, to the following:

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